(1)

No. 91-985

In The

Supreme Court Of The United States

October Term, 1991

ZBIGNIEW S. ROZBICKI,

Petitioner,

v.

STATEWIDE GRIEVANCE COMMITTEE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT
(Docket 14101)

PETITIONER'S BRIEF

SUSAN M. CORMIER
MOLLER, HORTON & FINEBERG, P.C.
90 Gillett Street
Hartford, CT 06105
(203) 522-8338
Counsel for Petitioner

WESLEY W. HORTON
MOLLER, HORTON & FINEBERG, P.C.
90 Gillett Street
Hartford, CT 06105
(203) 522-8338
Counsel of Record for Petitioner

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QUESTIONS PRESENTED

1. Does a finding of professional misconduct not alleged in the presentment violate the Petitioner's right to due process under the Fourteenth Amendment?

2. Are Connecticut's Code of Professional Responsibility DR 1-102(A)(6) and DR 7-101(A)(3) unconstitutionally vague under the Fourteenth Amendment?

3. Does the Connecticut Supreme Court's holding that reference to specific sections of the Code of Professional Responsibility is not required in a presentment for attorney misconduct violate the Petitioner's right to due process of law under the Fourteenth Amendment?

PARTIES TO THE CASE

The only parties are the Petitioner, Zbigniew S. Rozbicki, and the Respondent, Statewide Grievance Committee.

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OPINIONS BELOW

Decision of the Connecticut Superior Court in *Statewide Grievance Committee v. Rozbicki* (not published) (App. 27).

Opinion of the Connecticut Supreme Court, reported as *Statewide Grievance Committee v. Rozbicki,* 219 Conn. 473, 595 A.2d 819 (1991) (App. 1).

Order Denying Motion for Reargument (App. 26).

JURISDICTION

This petition is from the final judgment of the Connecticut Supreme Court on July 9, 1991, affirming the judgment entered by the Connecticut Superior Court on June 5, 1990.

A Motion for Reargument was timely filed on July 19, 1991 and denied on September 20, 1991.

The jurisdiction of this Court to review the judgment of the Connecticut Supreme Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISION INVOLVED

14th Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In this grievance case, the Petitioner was found guilty of professional misconduct and suspended from the practice of law for three months. That judgment was affirmed by the Connecticut Supreme Court.

On November 15, 1985, Helen Huybrechts filed a complaint against the Petitioner, alleging a number of claims. Ultimately, after a hearing, the Statewide Grievance Committee determined that the Petitioner was guilty of professional misconduct and directed that a presentment be filed against the Petitioner in Superior Court. Such a presentment was filed describing both specific factual circumstances and specific sections of the Code of Professional Responsibility pertaining to the Petitioner's alleged misconduct.[1] In Count I, the presentment charged the Petitioner with "Receiving real property in satisfaction of a legal fee from a client not represented by independent counsel" in violation of DR-102(A)(4), (5) and (6) and DR 7-101(A)(3) "in failing to reinstate the Complainant's mortgage in order to negotiate a release of that portion of the property the Complainant had conveyed to the [Petitioner]." (App. 28, 29, 61). Count III alleged that the Petitioner violated DR 1-102(A)(4) (5) and (6), DR 5-104 and DR 7-101(A)(3) by "determining all of the details of his purchase of the Complainant's home and arranging for her to be represented by counsel to avoid the appearance of a conflict of interest . . ." (App. 65). Only Counts I and III are relevant to this petition since the court exonerated the Petitioner on Count II.

The court found that the Petitioner and Complainant had maintained a social and professional relationship from

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[1]The presentment was dismissed based upon the failure of the subcommittee of the grievance committee to render a decision within ninety days of the probable cause determination. That judgment was vacated and the matter remanded for a determination of the merits of the complaint in *Statewide Grievance Committee v. Rozbicki*, 211 Conn. 232, 558 A.2d 986 (1989).

1978 to 1985 during which time the Petitioner represented the Complainant on a variety of legal matters (App. 28).

The allegations of Count I concern two land transfers from the Complainant to the Petitioner as payment for legal fees. The first transaction involved the transfer of land the court found was worth approximately eleven to twelve thousand dollars for legal fees of approximately $25,000 incurred during the Petitioner's representation of the Complainant in her dissolution proceedings. The Court found no misconduct as to this transfer (App. 47).

The second transaction involved the transfer of a second parcel of land for fees arising from the Petitioner's defense of an appeal taken by the Complainant's husband from the dissolution judgment. As for this transfer, the court found that both parties knew the land was worth about $15,000, that the Petitioner's fee for work on the appeal was not excessive, but that the Petitioner failed to submit a bill to the Complainant advising her of the incurred costs of the appeal and failed to make an unequivocal effort to assure that the Complainant obtained independent counsel before transferring the property to him (App. 48). The court concluded that this misconduct did not violate DR 5-104(A) but did violate DR 1-102(A)(6) in that it adversely reflected on his fitness to practice law (App. 48).

Count III of the presentment concerns the sale of a dwelling and the remaining land of the Complainant to the Petitioner. The Complainant first listed her property for sale for $260,000 with a real estate agent in June, 1984. She later signed a co-exclusive listing agreement on January 1, 1985, listing her property at $269,000. Both contracts permitted her to sell the property without a commission if the agent

did not procure the sale. The agent did procure a buyer who offered $250,000 on January 6, 1985 but that offer was rejected because the buyer required the Complainant to take back a purchase money second mortgage of $37,500. This offer was verbally amended to eliminate the second mortgage and conditioned only upon the buyer's qualifying for a $225,000 first mortgage and the Complainant repairing a roof (App. 52-53).

The buyer's bank told the buyer it would consider a $225,000 mortgage on the condition that he obtain a suitable co-signer for $37,500. When the buyer's attorney told the Petitioner that the mortgage had been approved (omitting mentioning the co-signer requirement), the Petitioner responded that the Complainant would not repair the roof at the offering price and that he was considering purchasing the property for $250,000 less the agent's commission. The trial court also found that the Complainant had repeatedly offered the property to the Petitioner, with the most recent offer made during her negotiations with the potential buyer (App. 53).

On January 18, 1985, the Petitioner learned that the buyer's bank had verbally approved a $200,000 loan but had not received an application from a co-signer. At approximately the same time the buyer's attorney informed him of Petitioner's intent to purchase the property and the Complainant's disinclination to repair the roof. The buyer then withdrew his offer on January 21, 1985 (App. 53).

On January 18, 1985, the Petitioner agreed to buy the Complainant's property for $232,500 less a credit of $7,500 for repairs of tenant damages. On January 18, 1985, the Petitioner also suggested to the Complainant that she hire Attor-

ney Gradowski to represent her which she did. The Petitioner provided Attorney Gradowski with the terms of the agreement. Attorney Gradowski performed a title search, prepared the contract and attended its execution. The contract was executed on January 22, 1985 (App. 54-55).

A closing scheduled for March 4, 1985 did not occur because of adjustments proposed by the Petitioner and incorporated by Attorney Gradowski in the closing statement. These claimed adjustments involved fees for legal services and other sums advanced to the Complainant for various matters. The Complainant rejected these adjustments and then sued the Petitioner for specific performance. That suit ended in a stipulated judgment and closing of title (App. 51-52).

As to this land transfer, the trial court found that while the Petitioner was opportunistic, he did not misrepresent facts to the Complainant on 1/18/85 concerning the status of the buyer's mortgage application. The court also found that Attorney Gradowski was not a pawn and that he acted on the Complainant's behalf. Finally, the court found that while the Complainant was not economically disadvantaged by the sale price to the Petitioner, the Petitioner did receive special benefits including a credit for tenant damages which the Petitioner obtained because he could reassure the Complainant that some or all of this sum could be recouped in an action against the tenant (App. 54-57).

The trial court concluded, however, that the Petitioner overreached in the contract negotiations by not informing the Complainant of fees and expenses he was owed until after the original closing date at a time when the Complainant was in severely distressed financial straits, that

he discouraged a potential buyer from continuing negotiations and that he did not obtain informed consent from the Complainant prior to entering into a business relation with her. The court held this violated DR 5-104, Limiting Business Relations with a Client (App. 58).

The court further found that the Petitioner determined all of the details of the purchase and arranged for Attorney Gradowski to represent the Complainant without Gradowski's knowledge to avoid the appearance of a conflict of interest. The court held that the Petitioner's conduct violated DR 1-102(A)(6) in that it adversely reflects on the Petitioner's fitness to practice law and DR 7-101(A)(3) in that he intentionally prejudiced or damaged his client during the course of the professional relationship (App. 59).

The court then reprimanded the Petitioner and suspended him from the practice of law for three months (App. 59).

From that judgment the Petitioner appealed, claiming his federal due process rights were violated because the judgment was based on conduct and issues not alleged in the complaint, and on disciplinary rules that were void for vagueness (App. 68). At oral argument, the Respondent's counsel admitted that no claim of misconduct was being made for the period before January 22, 1985 (App. 77-78). The Connecticut Supreme Court affirmed the trial court on July 9, 1991 (App. 1). The Petitioner's Motion for Reargument was denied on September 19, 1991 (App. 26).

REASONS FOR GRANTING THE WRIT

1. Conduct and Issues Not Alleged

The presentment alleged specific violations of specific sections of the Code of Professional Responsibility. In Count I, the Respondent charged the Petitioner with "Receiving real property in satisfaction of a legal fee from a client not represented by independent counsel" in violation of DR-102(A)(5) and (6) and 5-104. Prior to trial, counsel for Petitioner summarized the charges, making it clear what the Petitioner thought was at issue before the trial court. He expressed a concern that the focus be limited to the presentment, as the hearings before the grievance committee "got pretty far afield." (App. 69-70). Immediately following these statements, the trial court summarily disposed of several pre-trial motions and stated: "So we can – as far as I know, we're proceeding on the Complaint." (App. 71). At the end of trial, the court assured counsel that it would stick to the four corners of the complaint (App. 71-72). Yet after trial, the court found that the Petitioner violated DR 1-102(A)(6) but not DR 5-104 in failing to disclose the cost of the appeal and to make an unequivocal effort to advise the Complainant of independent counsel (App. 48).

The Connecticut Supreme Court rejected the Petitioner's claim that the trial court's finding of misconduct on a basis not alleged in the presentment violated the Petitioner's right to due process of law because:

> The presentment apprised the defendant that these two transactions were the basis of the grievance committee's allegations of misconduct. There is no question that the factual circumstances that served as the basis of the grievance committee's allegations and the

> trial court's eventual conclusions were known to the defendant, that all aspects of the two transactions were completely developed at the hearing, and the defendant was given a full opportunity to respond. Under these circumstances, we conclude that the requirements of due process were met.

219 Conn. at 484.

The point is not that the complaint and the decision involved the same transactions. The point is that the Respondent alleged one type of misconduct and the court found another. In *Re Ruffalo,* 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968), the charge upon which a lawyer was disbarred was not raised until after the lawyer had testified at length. This Court held that such a proceeding becomes a "trap" because the lawyer can "be given no opportunity to expunge the earlier statements and start afresh." 390 U.S. at 551. If the Connecticut Supreme Court is correct, Ruffalo should not have succeeded in his appeal since the original charges and the charge upon which the disbarment was based involved the same transaction, i.e. Ruffalo's employment of the railroad investigator. This Court did not take that position.

Here the Petitioner was never apprised of the charge upon which he was found guilty on the first count prior to the trial court's decision. The Petitioner, as in *Ruffalo,* relied on what the Respondent alleged in presenting his defense. That charge was restricted to the Complainant's lack of representation. It was undisputed that the Complainant was not represented by other counsel when she transferred the second parcel of land to the Petitioner. The Petitioner's defense therefore was legal rather than factual. His position

was that the transaction did not violate the rule alleged. What the Petitioner told the Complainant was irrelevant to the charge brought by the Respondent.

However, what the Petitioner said was relevant to the charge found by the trial court, i.e., the Petitioner did not make an *unequivocal* effort to assure the Complainant's representation (emphasis added). Had the Petitioner known of this charge, he would have been more precise in his testimony on that issue and presented additional evidence.

The variance between the complaint and the decision is especially crucial since the trial court found that the fee was not excessive and that both parties knew the value of the land (App. 48). Thus it is difficult to see the ethical impropriety in the Petitioner's failure to send the Complainant a bill before she conveyed the land to him for his fee or to unequivocally assure that she was represented by independent counsel for this transaction.

The trial court also found the Petitioner guilty of a charge not made on Count III. DR 5-104(A), Limiting Business Relations with a Client, was at the heart of this Count. At oral argument before the Connecticut Supreme Court, the Respondent's counsel conceded that the Petitioner did nothing wrong before January 22, 1985 (App. 77-78). On January 18, 1985, the date the Petitioner orally agreed to buy the property, he advised the Complainant to hire independent counsel, which she did. When the contract for the sale of the property was executed on January 22, 1985, the Complainant was represented by independent counsel. That being so, DR 5-104(A) was inapplicable on that date because the Complainant was no longer the Petitioner's client. To apply that rule based on any of the Petitioner's actions prior to

January 22 violated the Petitioner's right to due process under the Fourteenth Amendment by finding him guilty of a charge not made.

Moreover, at the end of trial, the court stated that if there was no evidence of a prior arrangement between Mr. Gradowski and the Petitioner to the detriment of the client, the court considered the issue on Count III to be substantially the same as Count I. Earlier the court identified the issue on Count I as limited to paragraph 13 of the Complaint (App. 75). The issue framed in that paragraph was whether the Respondent violated the disciplinary rules alleged in receiving real property in satisfaction of a legal fee from a client not represented by independent counsel (App. 61). The sole issue then on Count III was whether the Complainant was represented by independent counsel in the property transfer. The trial court found that she was so represented, rejecting the Respondent's claim that Attorney Gradowski was a pawn of the Petitioner (App. 54-56). The court's findings of misconduct (br. 6-7) all are based on grounds other than the lack of independent counsel. They therefore also violate the Petitioner's right to due process under the Fourteenth Amendment by finding him guilty of a charge not made.

2. Void for Vagueness

The trial court's decision in Count I was based solely on DR 1-102(A)(6). Its decision on Count III was based on DR 1-102(A)(6), 5-104 and 7-101(A)(3). In light of the Respondent's concession at oral argument before the Connecticut Supreme Court, Count III cannot be sustained on DR 5-104 (see br. 10). That leaves only DR 1-102(A)(6) and 7-101(A)(3) as the basis for the Petitioner's suspension.

In *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626, 653, n. 15, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985), this Court questioned the vagueness of Ohio's attorney advertising rules:

> Because "[a] relevant inquiry in appraising a decision to disbar is whether the attorney stricken from the rolls can be deemed to have been on notice that the courts would condemn the conduct for which he was removed," *in re Ruffalo,* 390 U.S. 544, 554, 20 L.Ed.2d 117, 88 S.Ct. 1222, 43 Ohio Ops 2d 459 (1968) (White J., concurring in result), it may well be that for Ohio actually to disbar an attorney on the basis of its disclosure requirements as they have been worked out to this point would raise significant due process concerns.

This case presents even stronger due process concerns. In *Zauderer,* the rules at least addressed the specific area of advertisements and contingency fees, providing some notice that an attorney must exercise caution in such advertising. The rules here do not refer to any specific area of conduct. DR 1-102(A)(6) simply proscribes "conduct that adversely reflects on [a lawyer's] fitness to practice law."[1] DR 7-101(A)(3) states that: "A lawyer shall not intentionally . . . prejudice or damage his client during the course of the professional relationship, except as required under DR 7-102(B)." These rules provide no guidance regarding what an attorney must do to comply with them. Without such notice, suspending the Petitioner from the practice of law

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[1]This rule was repealed in 1986, subsequent to this action when the Code of Professional Responsibility was replaced by the Rules of Professional Conduct.

for ninety days based on a violation of these rules violates the Petitioner's right to due process of law. The penalty is severe. The disruption of a lawyer's practice for three months may well have a serious impact upon the continuation of that practice.

To avoid such a due process violation, DR 1-102(6) and 7-101)(A)(3) should provide a basis for suspension or disbarment only when the conduct in question is such that reasonable attorneys would consider it unethical. See *Re Ruffalo,* 390 U.S. 544, 555-56, 88 S.Ct. 1222, 20 L.Ed.2d 11 (1968) (White, J., concurring in result). The conduct leading to the Petitioner's suspension does not fall in that category.

Regarding the 1982 transaction, it is not readily apparent that it is unethical to fail to submit a bill before accepting property in lieu of money where there is no claim that the fee is excessive or that the value of the land grossly exceeds the fee and where both parties knew the value of the land. Nor is it readily apparent that it is unethical to fail to ensure one's client is represented by counsel before settling a fee.

As for the 1985 sale of property, the Respondent conceded that the Petitioner did nothing wrong before January 22, 1985. By that date, the Complainant was represented by independent counsel who acted in her behalf. The only purportedly wrongful conduct after that date cited by the court was the Petitioner's failure to inform the Complainant of his outstanding fees until after the original closing date (App. 58). Yet the court had previously found that the Petitioner's intent to use the sale to obtain all monies owed to him by the Complainant was not by itself inculpatory (App. 57-58). Moreover, the Complainant could and did refuse to close on the Petitioner's terms (App. 51).

That the Petitioner determined the details of the purchase where the other party is represented by counsel is not such conduct that all reasonable attorneys would consider improper. The trial court had found that the Complainant had asked the Petitioner to buy her property a number of times over the years with her last request coming after another potential buyer had appeared. The selling price was the same as that offered by the potential buyer (less the commission the Complainant would not have to pay). The Complainant would have to make an adjustment for the roof repairs for either buyer. The Complainant was not economically disadvantaged by the sale price to the Petitioner. The Complainant was also aware of the tenant damages and was seeking to recover them in another action. The Petitioner did not misrepresent to the Complainant the facts relating to the status of the other buyer's loan application. (App. 53-57).

It is not unusual for one party to take a more active role in working out the details of an agreement. The "details" here do not compel a conclusion that the Petitioner's action in working out an arrangement actively sought by the Complainant was unethical.

The real crux of the Respondent's complaint in Count III was the employment of Attorney Gradowski which the Respondent alleged was a sham to conceal a real conflict of interest. The trial court rejected that claim (App. 55). It is difficult to see how the Petitioner could be faulted for arranging for Attorney Gradowski to represent the Complainant to avoid the appearance of conflict of interest when the court failed to find any actual conflict, and more importantly, found that the attorney obtained by the Petitioner represented the Complainant in good faith and in her behalf (App. 56).

The Petitioner has been deprived of his right to practice his profession for ninety days primarily because he did not make sufficient efforts to obtain independent counsel for the Complainant in their land for fee transaction in 1982 and because of his motive in 1985 in obtaining counsel who then represented the Complainant competently and appropriately. This conduct is not so clearly wrong that an attorney would be on notice that it would "adversely reflect on his fitness to practice law" (DR 1-102(A)(6) or "prejudice or damage his client during the course of the professional relationship" (DR 7-101(A)(3)).

The conduct here falls far short of that involved in vagueness challenges to similar rules in various other state cases. In those cases, the validity of the rules was upheld either because the conduct also violated other more specific rules or because all attorneys would recognize the conduct as prohibited. See *Disciplinary Matter Involving West,* 805 P.2d 351 (Alaska 1991) (attorney intentionally notarized false statement: conduct also violated DR 7-102(A)(5) prohibiting the intentional making of false statements); *Matter of Cohen,* 139 A.D.2d 221, 530 N.Y.S.2d 830 (1988) (attorney intentionally attempted to evade service of subpoena and order to show cause); *People v. Morley,* 725 P.2d 510 (Colo. 1986) (attorney counselled illegal activity): *Matter of Sekerez,* 458 N.E.2d 229 (Ind. 1984) (intentional and unexcused failure to attend scheduled hearing on a client's case); *Committee on Professional Ethics v. Dunham,* 279 N.W.2d 280 (Iowa 1979) (sexual contact with a client in a professional context).

DR 1-102(A)(6) and 7-101(A)(3) do not provide sufficient guidance to an attorney to determine whether the conduct here is forbidden. Application of these rules under these circumstances deprived the Petitioner of due process of law.

3. Specific Rules

In attorney disciplinary hearings, the due process required "includes fair notice of the charge." *Re Ruffalo,* 390 U.S. 544, 550, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968). The Petitioner presented his case in the trial court on the basis of the charges made by the Respondent. He presented his appeal in the Connecticut Supreme Court on the basis of those charges and the holdings of the trial court. His theory in both courts was that his conduct did not violate any specific provision of the Code of Professional Responsibility.

In footnote 3 of its decision, the Connecticut Supreme Court said his presentation was irrelevant:

> In a presentment for attorney misconduct, reference to specific sections of the Code of Professional Responsibility is not required. Because of its sui generis character, the reference to specific rules of professional conduct within the context of a presentment does not, unlike a criminal statute, constitute the only basis for a finding of guilt, but serves rather to assist the trial court in making its own conclusions as to whether, under the totality of the circumstances, professional misconduct has occurred.

Statewide Grievance Committee v. Rozbicki, 219 Conn. 473, 476-77 n. 3, 595 A.2d 819 (1991). The Connecticut Supreme Court thus sanctioned the suspension of the Petitioner based upon the trial court's conclusion that "under the totality of the circumstances, the [Petitioner] was guilty of professional misconduct." 219 Conn. at 476. This standard for determining attorney misconduct violates the "basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Mesquite v.*

Aladdin's Castle, Inc., 455 U.S. 283, 289, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982). This standard is a particularly egregious violation of that rule because not only are the prohibitions "not clearly defined," they are not defined at all. Since the Code of Professional Responsibility (now Rules of Professional Conduct) is merely "advisory," an attorney may be suspended or disbarred for conduct not prohibited by the Code. More important, an attorney has no place to look for guidance regarding the propriety of his conduct. Nor can an attorney prepare a defense to charges of misconduct where the standard is whether the conduct is unethical under the "totality of the circumstances" and the "courts are, as they should be, left free to act as may in each case seem best . . . (citations omitted)." *Statewide Grievance Committee v. Rozbicki,* 219 Conn. at 476-77, n. 3. The Petitioner made a federal due process challenge to footnote 3 in his Motion for Reargument (App. 17).

Nothing in the Preamble to the Code, the Preface to the Rules, or the previous decisions of the Connecticut Supreme Court would have alerted the Petitioner to the standard he is held to have violated.

The Connecticut Supreme Court misconstrued the Preamble to the Code and the Preface to the Rules in effect at the time of the Petitioner's presentment. Immediately after the Preamble, the Code has a Preliminary Statement, which divides up the Code into Canons, Ethical Considerations and Disciplinary Rules.[2] It is clear from the Preliminary

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[2]The Code of Professional Responsibility was replaced in 1986 by the Rules of Professional Conduct. The disciplinary rules and ethical considerations were replaced by black letter rules and official commentary on those rules.

Statement that only the Disciplinary Rules are meant to be the basis for disciplinary action:

> The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession. They embody the general concepts from which the Ethical Considerations and the Disciplinary Rules are derived.
>
> The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations.
>
> The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.

It is further clear that the language in the paragraph in the Preamble quoted by the court in its footnote refers to the Ethical Considerations paragraph, for the content of the two is very similar.

The Preface to the Rules of Professional Conduct must likewise be read in conjunction with the immediately following Preamble and Scope. The last paragraph of the Preamble states:

> Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal

system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

The first paragraph of the Scope states:

> The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has professional discretion. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

So read in context, the Preface gives no warrant to the Court's holding that the Rules are merely advisory.

The Code and the Rules were adopted by the judges of the Superior Court to regulate the conduct of lawyers in a comprehensive way. The effect of footnote 3 is to make the Rules less than comprehensive. Moreover, its effect is to make the standards concerning lawyers vaguer at a time when the Rules themselves are being made more specific,

such as in the elimination of DR 1-102(A)(6) when the Rules were adopted in 1986.

Finally, the one case cited by the court in its footnote does not support its holding at all. The quotation from *In re Peck,* 88 Conn. 447, 457, 91 A. 274 (1914), concerns the procedural mechanisms for hearing grievances, not the substantive grounds for finding a lawyer guilty.

The standard for suspension from practice in Connecticut as enumerated in footnote 3 renders all attorneys in Connecticut defenseless against claims of misconduct because now ethical conduct in Connecticut is what a court says it is based upon "the totality of the circumstances." Each judge may establish his own standard, thereby creating as many standards as there are judges. Attorneys who look to the Code of Professional Responsibility to govern their conduct cannot be assured that compliance with the Code will protect them from a finding of misconduct. Such a situation is intolerable. The standard enumerated in footnote 3 is void for vagueness under the due process clause of the Fourteenth Amendment to the U.S. Constitution. This issue is one of grave importance to the Petitioner and to all the members of the Connecticut Bar.

CONCLUSION

The suspension of the Petitioner from the practice of law was based upon a finding of misconduct not alleged, and the application of a standard and disciplinary rules which provide no notice that the conduct in question is prohibited. As a result, the Petitioner was deprived of the ability to practice his profession for a period of ninety days without due process of law. The decision of the Connecticut Supreme Court has an adverse impact not only upon the Petitioner but upon the entire Connecticut Bar.

For these reasons, the petition for certiorari should be granted.

Respectfully submitted,

WESLEY W. HORTON
90 Gillett Street
Hartford, CT 06105
(203) 522-8338

Counsel of Record for Petitioner

SUSAN M. CORMIER
90 Gillett Street
Hartford, CT 06105
(203) 522-8338

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STATEWIDE GRIEVANCE COMMITTEE v. ZBIGNIEW S. ROZBICKI (14101)

PETERS, C. J., SHEA, CALLAHAN, COVELLO and F. X. HENNESSY, Js.

The defendant attorney appealed from the judgment of the trial court finding him guilty of professional misconduct and suspending him from the practice of law for three months. He claimed, inter alia, that the presentment filed by the grievance committee should have been dismissed for

failure to comply with the rule of practice (§ 31 [a]) requiring a hearing to be held within sixty days of the date the complaint was filed in court. The hearing on the complaint against the defendant did not commence until some twenty months after it was filed. *Held:*

1. The trial court did not abuse its discretion in refusing to dismiss the complaint; the terms of § 31 (a) are directory, not mandatory, and, in the context of this case, in which the major part of the delay was due to an earlier appeal to this court and to the trial court's attempt to arrange a trial date convenient for the complainant who was then living overseas, the purpose of the rule, i.e., to avoid unnecessary and unreasonable delays, was met.
2. The defendant could not prevail on his claim that he was not adequately informed of the charges against him, there being no question that the factual circumstances that served as the basis of the grievance committee's allegations and the trial court's conclusions were known to the defendant and were completely developed at the hearing and that the defendant was given a full opportunity to respond.
3. The defendant did not show that the trial court's predicate factual findings were clearly erroneous.
4. The defendant did not sustain his burden of proving his claim that the disciplinary rules that he was accused of violating are unconstitutionally vague; the defendant should have been aware that failing to inform a client of outstanding disbursements and legal fees, arranging the terms of the purchase of a client's real estate as a means to satisfy those fees and discouraging another buyer is conduct that would prejudice his client and adversely affect his fitness to practice law within the meaning of those rules.

Argued March 21—decision released July 9, 1991

Presentment in three counts by the plaintiff for alleged professional misconduct by the defendant, brought to the Superior Court in the judicial district of Litchfield, where the court, *Moraghan, J.*, rendered judgment granting the defendant's motion to dismiss the entire presentment, from which the plaintiff appealed and the defendant cross appealed; this court vacated the trial court's decision, remanded the case for further proceedings and dismissed the cross appeal; on remand, the case was transferred to the judicial district of Hartford-New Britain at New Britain, where the court, *Dorsey, J.*, granted the defendant's motion

to dismiss and rendered judgment thereon; thereafter, the court, granted the plaintiff's motion to open the judgment and, after a trial to the court, rendered judgment suspending the defendant from the practice of law for three months; subsequently, the court denied the defendant's motion to open the judgment and to reargue, and the defendant appealed. *Affirmed.*

Wesley W. Horton, with whom were *Francis J. MacGregor* and *Paul J. McQuillan,* for the appellant (defendant).

Seymour N. Weinstein, for the appellee (plaintiff).

COVELLO, J. This is an appeal from a judgment rendered on a presentment in which the Superior Court concluded that the defendant was guilty of professional misconduct. The procedural facts are as follows: on November 18, 1985, Helen Huybrechts filed a complaint with the Litchfield Grievance Panel alleging, inter alia, that the defendant (1) was suing her for legal fees she had not agreed to pay; (2) had purchased her home and two parcels of land for less than fair value; and (3) had received funds due her from a dissolution proceeding without accounting for them. On November 19, 1987, after the grievance panel had found probable cause, the Statewide Grievance Committee (grievance committee) conducted a hearing and determined that the defendant was guilty of professional misconduct. The grievance committee directed that a presentment be filed against the defendant in Superior Court. On May 10, 1988, counsel for the grievance committee filed a presentment pursuant to Practice Book § 31 alleging that the defendant committed professional misconduct. The presentment, in addition to describing the attendant factual circumstances, referred to specific sections of the Code of Professional Responsibility in

describing the defendant's misconduct.[1] On June 10, 1988, the defendant filed a motion to dismiss the presentment based upon the failure of the subcommittee of the grievance committee to render a decision within ninety days of the probable cause determination as required by General Statutes § 51-90g (c).[2] The trial court granted the motion. In response to an appeal by the grievance committee, we vacated the judgment of the trial court granting the motion to dismiss and remanded the matter for a determination of the merits of the complaint. *Statewide Grievance Committee* v. *Rozbicki*, 211 Conn. 232, 246, 558 A.2d 986 (1989). On June 5, 1990, following lengthy hearings, the trial court filed its memorandum of decision, concluding that, under the totality of circumstances, the defendant was guilty of professional misconduct.[3] The trial court ren-

[1] The presentment alleged that the defendant had violated DR 1-102 (A) (4), (5) and (6), DR 5-104, and DR 7-101 (A) (3) of the Code of Professional Responsibility.

DR 1-102 (A) provides in part: "A lawyer shall not . . .

"(4) Engage in illegal conduct involving dishonesty, fraud, deceit, or misrepresentation.

"(5) Engage in conduct that is prejudicial to the administration of justice.

"(6) Engage in any other conduct that adversely reflects on his fitness to practice law."

DR 5-104 provides in part: "(A) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure."

DR 7-101 (A) (3) provides: "A lawyer shall not intentionally . . .

"(3) Prejudice or damage his client during the course of the professional relationship, except as required under DR 7-102 (B)."

[2] General Statutes § 51-90g (c) provides in part: "The subcommittee shall conclude any hearing or hearings and shall render its proposed decision not later than ninety days from the date the panel's determination of probable cause or no probable cause was filed with the state-wide grievance committee. The subcommittee may file a motion for extension of time not to exceed thirty days with the state-wide grievance committee which shall grant the motion only for good cause shown."

[3] Code of Professional Responsibility DR 5-104, DR 1-102 (A) (6), and DR 7-101 (A), see footnote 1, supra.

The trial court's memorandum of decision referred to specific sections of the Code of Professional Responsibility. In a presentment for attorney

dered judgment suspending the defendant's right to practice law for three months. The defendant again appealed. We transferred the matter to ourselves pursuant to Practice Book § 4023 and now affirm.

The trial court found that the complainant and the defendant had maintained a social and professional relationship from 1978 to 1985 during which time the defendant had undertaken to represent the complainant in a marital dissolution action, had lent money to the complainant for payment of her mortgage and personal needs, and had advanced funds for her litigation expenses. On October 31, 1980, the complainant quitclaimed 22 acres of land to the defendant in payment of legal services

misconduct, reference to specific sections of the Code of Professional Responsibility is not required. Because of its sui generis character, the reference to specific rules of professional conduct within the context of a presentment does not, unlike a criminal statute, constitute the only basis for a finding of guilt, but serves rather to assist the trial court in making its own conclusions as to whether, under the totality of the circumstances, professional misconduct has occurred. The Code of Professional Responsibility, in force at the time of the defendant's purchase of the complainant's home, did not attempt to define the full measure of behavior that would constitute misconduct. In its preamble it stated: "The Code of Professional Responsibility *points the way* to the aspiring and provides standards by which to judge the transgressor. Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards. But in the last analysis it is the desire for the respect and confidence of the members of his profession and of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction. So long as its practitioners are guided by these principles, the law will continue to be a noble profession. This is its greatness and its strength, which permit of no compromise." (Emphasis added.) Similarly, the present Rules of Professional Conduct, effective October 1, 1986, state in their Preface: "The rules do not, however, exhaust the moral and ethical considerations that should inform . . . a lawyer [but] simply provide a framework for the ethical practice of law." Thus, "courts are, as they should be, left free to act as may in each case seem best in this matter of most important concern to them and to the administration of justice." *In re Peck*, 88 Conn. 447, 457, 91 A. 274 (1914).

previously rendered and billed to her. The trial court concluded that none of the aspects of this transaction constituted professional misconduct.

In due course the dissolution action went to judgment. The defendant in that action appealed and the defendant here undertook to represent the complainant in connection with the appeal. The trial court found that the defendant had never submitted a bill to the complainant advising her of the full costs of his legal services for the appeal. On February 24, 1982, the complainant quitclaimed another 30 acre parcel to the defendant in payment of the additional legal fees. The trial court concluded that by failing to disclose fully the costs of his representation to date and by failing to make an unequivocal effort to ensure that the complainant obtained independent counsel in connection with this second transfer, the defendant was guilty of professional misconduct.

The trial court further found that on January 6, 1985, L. Warfield Ogden had offered to buy the complainant's home for $250,000, provided that the complainant took back a purchase money mortgage of $37,500. On the advice of the defendant, the complainant rejected this offer. Ogden thereafter amended his offer by eliminating the purchase money mortgage. The defendant, however, at a later meeting with Ogden's attorney, informed him that the complainant was unwilling to repair the roof and that the defendant himself was considering purchasing the property. The complainant had, in fact, offered to sell the property to the defendant several times in the past. Ogden thereafter withdrew his offer.

On January 18, 1985, the defendant sent a letter to the complainant indicating that there were outstanding legal fees of about $5300. The trial court also found

that on January 22, 1985, the defendant signed a contract with the complainant to sell him her home for $232,500 with a credit of $7500 for roof repairs and damage done by a tenant. The defendant had arranged for attorney Walter Gradowski to represent the complainant in connection with the transaction but had not first informed Gradowski that he would be representing the complainant. The defendant thereafter provided all the essential terms of the contract to Gradowski. Although the closing date had originally been set for March 1, 1985, the closing date was moved to March 4, because the complainant was unable to vacate by the earlier date. On March 2, 1985, the defendant prepared a statement of the balance due for his legal services in connection with the appeal and for work still in progress. This bill totaled $7900. Gradowski incorporated this sum into the closing statement. This was unacceptable to the complainant who refused to close at that date. The trial court determined that the defendant had made no disclosure to her that she would be responsible for some or all of these legal fees at the closing, that some of the fees related to cases not yet completed, and that no invoice for the most recent legal services had been provided to the complainant prior to March 2, 1985. The trial court concluded that the defendant was guilty of professional misconduct in that he had overreached his client in advancing his own interests, by failing to inform the complainant of his fees until the closing date and by discouraging a potential buyer. Based upon all of the foregoing, the trial court then ordered the defendant's suspension for three months.

The defendant has appealed, claiming that the trial court improperly: (1) denied the defendant's motion to dismiss the presentment for failure to comply with Practice Book § 31 (a); (2) made findings on issues not contained in the presentment; and (3) made incorrect

factual findings relative to the claim that he had committed misconduct in the purchase of the complainant's house. The defendant also claimed that DR 1-102 (6) and DR 7-101 (A) of the Code of Professional Responsibility are unconstitutionally vague and violate the fourteenth amendment to the United States constitution. We affirm the judgment of the trial court.

I

The defendant first claims that the presentment should have been dismissed for failure to comply with Practice Book § 31 (a). Practice Book § 31 (a) states, in pertinent part, that: "Any interim proceedings to the contrary notwithstanding, a hearing on the merits of the [presentment] *shall* be held within sixty days of the date the complaint was filed with the court." (Emphasis added.)

The relevant dates are as follows. On April 28, 1988, the grievance committee filed the presentment. On May 23, 1989, we remanded the matter to the trial court for a hearing on the merits. On February 20, 1990, the hearing commenced, 22 months after the presentment was filed and 9 months after we ordered the remand. The defendant argues that the language of § 31 (a) mandates dismissal under these circumstances.

The rules of statutory construction apply equally to statutes and rules of practice; *Grievance Committee* v. *Trantolo*, 192 Conn. 15, 22, 470 A.2d 228 (1984); and in the interpretation of statutes the word "shall" may have a meaning that is directory rather than mandatory. *Fidelity Trust Co.* v. *BVD Associates*, 196 Conn. 270, 278, 492 A.2d 180 (1985). "The test to be applied in determining whether a statute is mandatory or directory is whether the prescribed mode of action is the essence of the thing to be accomplished, or in other

words, whether it relates to a matter of substance or a matter of convenience. *International Brotherhood of Teamsters* v. *Shapiro*, 138 Conn. 57, 68, 82 A.2d 345 (1951). If it is a matter of substance, the statutory provision is mandatory. *State ex rel. Eastern Color Printing Co.* v. *Jenks*, 150 Conn. 444, 451, 190 A.2d 591 (1963). If, however, the legislative provision is designed to secure order, system and dispatch in the proceedings, it is generally held to be directory, especially where the requirement is stated in affirmative terms unaccompanied by negative words. *Winslow* v. *Zoning Board*, 143 Conn. 381, 388, 122 A.2d 789 (1956). 'Such a statutory provision is one which prescribes what shall be done but does not invalidate action upon a failure to comply.' *Broadriver, Inc.* v. *Stamford*, 158 Conn. 522, 529, 265 A.2d 75 (1969)." *Fidelity Trust Co.* v. *BVD Associates*, supra, 278.

Practice Book § 31 (a) is designed to encourage order and dispatch in the prosecution of presentments. This section is cast in affirmative words, contains no penalty for noncompliance and purports only to establish a time limit for acting upon complaints. We conclude therefore that its terms are directory, and not mandatory, and that failure to meet its time requirements does not deprive the court of jurisdiction. In the context of this case, in which the major part of the delay was due to the plaintiff's appeal and the defendant's cross appeal to this court and the trial court's attempt to arrange a convenient trial date for the complainant, then living overseas, we conclude that the purpose of § 31 (a), to avoid unnecessary and unreasonable delays, has been met and that the trial court did not abuse its discretion in refusing to dismiss the complaint. " 'Such statutes as ours are not restrictive of the inherent powers which reside in courts to inquire into the conduct of their own officers . . . .' Consequently,

ministerial delays do not ordinarily warrant judicial abstention from dealing with the important issues raised by allegations of attorney misconduct." *Statewide Grievance Committee* v. *Rozbicki*, 211 Conn. 232, 239, 558 A.2d 986 (1989), quoting *In re Peck*, 88 Conn. 447, 457, 91 A. 274 (1914).

II

The defendant next claims that the judgment of the trial court violates Connecticut law and the due process clause of the fourteenth amendment to the United States constitution by making findings of fact regarding issues not alleged in the presentment. Specifically, the defendant argues that the misconduct based upon the circumstances concerning the second land transfer was neither alleged in the presentment nor supported by the evidence heard at trial and that he was, therefore, denied adequate notice of the charges against him as required by the United States constitution. We disagree.

Paragraphs ten and twelve of count one of the presentment specifically allege that the complainant "in satisfaction of [his] fee for services, conveyed a second parcel of real property to the [defendant] on February 24, 1982," and that "the deed was prepared by the [defendant's] office and signed by the Complainant who was not represented by independent counsel." Therefore, contrary to the defendant's assertion, there were specific allegations in the presentment putting in issue the second land transfer. Further, "[i]t is important . . . to emphasize that the rules regulating attorney grievance procedures exist within the broader framework of the relationship between attorneys and the judiciary. . . . An attorney 'as an officer of the court in the administration of justice, is continually accountable to it for the manner in which he exercises the priv-

ilege which has been accorded him.' In re Peck, 88 Conn. 447, 450, 91 A. 274 (1914)." *Statewide Grievance Committee* v. *Rozbicki*, 211 Conn. 232, 238-39, 558 A.2d 986 (1989). " ' "The proceeding to disbar [or suspend] an attorney is neither a civil action nor a criminal proceeding, but is a proceeding sui generis, the object of which is not the punishment of the offender, but the protection of the court." *In re Bowman*, 7 Mo. App. 569 [1879].' " *In re Application of Pagano*, 207 Conn. 336, 339, 541 A.2d 104 (1988). Thus, "courts are, as they should be, left free to act as may in each case seem best in this matter of most important concern to them and to the administration of justice." *In re Peck*, supra, 457. "Once the complaint is made, 'the court controls the situation and procedure, in its discretion, as the interests of justice may seem to it to require.' *In re Peck*, supra [452]." *Statewide Grievance Committee* v. *Rozbicki*, supra, 238–39. Thus we conclude that it was not an abuse of the court's inherent power in presentment proceedings to find that the defendant committed professional misconduct in connection with the second land transfer based upon the allegations contained in the presentment.

There is equally no merit in the defendant's further argument that the trial court's finding that he failed to disclose the costs of his services was "completely outside the issues raised in . . . the . . . trial." At trial, evidence was admitted and the defendant testified that "there was no formal bill prepared" or statement of account given to the complainant. In light of this evidence, we cannot say that the trial court abused its discretion in finding that the defendant failed to submit a bill for these services.

The defendant further claims that the allegations in the presentment were so imprecise that the subsequent court proceedings violated his constitutional rights to

due process. In the context of presentment actions, " '[d]ue process does not mandate a particular procedure but rather requires only that certain safeguards exist in whatever procedural form is afforded.' *Hartford Federal Savings & Loan Assn.* v. *Tucker,* 196 Conn. 172, 176, 491 A.2d 1084, cert. denied, 474 U.S. 920, 106 S. Ct. 250, 88 L. Ed. 2d 258 (1985). 'In [presentment] proceedings such as this a defendant is entitled *to notice* of the charges against him, *to a fair hearing,* and a fair determination, in the exercise of sound judicial discretion, of the questions at issue, and *to an appeal* to this court for the purpose of having it determined whether or not he has in some substantial manner been deprived of such rights.' *Grievance Committee of the Bar of New Haven County* v. *Sinn,* 128 Conn. 419, 422, 23 A.2d 516 (1941)." (Emphasis added.) *Statewide Grievance Committee* v. *Presnick,* 215 Conn. 162, 169, 575 A.2d 210 (1990).

The trial court's conclusions were based upon allegations concerning the defendant's behavior in connection with the complainant's transfer to him of the 30 acre parcel and the later transfer of the complainant's home to him. The presentment apprised the defendant that these two transactions were the basis of the grievance committee's allegations of misconduct. There is no question that the factual circumstances that served as the basis of the grievance committee's allegations and the trial court's eventual conclusions were known to the defendant, that all aspects of the two transactions were completely developed at the hearing, and the defendant was given a full opportunity to respond. Under these circumstances, we conclude that the requirements of due process were met. *In re Application of Courtney,* 162 Conn. 518, 523, 294 A.2d 569 (1972).

III

The defendant's third claim is that the trial court's findings in relation to the third count of the presentment were incorrect. Count three alleged that the defendant was guilty of professional misconduct by "determining all of the details of his purchase of the Complainant's home and arranging for her to be represented by counsel to avoid the appearance of a conflict of interest."

The trial court found that the complainant and the defendant entered into an agreement in which the complainant agreed to sell the defendant her home for $232,500. The trial court further found that while the complainant was not economically disadvantaged by the sale, the defendant did receive a "special benefit" on the purchase price in connection with a credit for damage done by a prior tenant. The trial court concluded that these benefits would not have been obtained by a third party buyer in an arm's length transaction.

The trial court further found that the defendant had dictated all of the details of his purchase of the complainant's home and had arranged for her to be represented by another attorney after the terms of the contract had been established unilaterally by the defendant. The trial court also determined that the sale of the property was designed to serve as a vehicle for the payment of expenses that the defendant had not yet disclosed to the complainant and that related to work not completed. The trial court concluded that the evidence was "clear and convincing that [the defendant] overreached in the contract negotiations to advance his own interest [in] that he did not inform the Complainant of his outstanding legal fees or the full amount of monies owed to him until after the original

closing . . . and that he discouraged a potential buyer . . . and that [the defendant] did not obtain intelligent informed consent from Complainant prior to entering into this business relation with her."

The defendant again argues that the trial court's conclusions relate to factual issues not raised in the presentment and are unsupported by the facts. The defendant specifically claims that the finding that he determined the details of the contract is incorrect because the contract was prepared not by the defendant, but by a third party attorney. The defendant further claims that the finding that he received a special benefit, in and of itself, is insufficient to support a finding that DR 5-104 had been violated.

In its memorandum of decision the trial court did not say that the defendant actually wrote out the contract for the sale of the house, but that "[the defendant] provided Gradowski with the essential terms and conditions of the contract." In addition, the trial court did not base its judgment that the defendant violated DR 5-104 solely upon its finding that defendant received a special benefit. The trial court, in fact, stated that the defendant's use of the sale as a device for obtaining reimbursement for various expenses "[v]iewed independently . . . is not inculpatory." The trial court did conclude, however, that the evidence, *viewed as a whole,* described a transaction in which the defendant overreached his client to pursue his own self-interest in violation of DR 5-104 (A) which states that: "A lawyer shall not enter into a business transaction with a client if they have differing interests therein . . . unless the client has consented *after full disclosure.*" (Emphasis added.)

" '[A]n attorney whose fitness is challenged before the authority to which he owes and is responsible for the privileges he enjoys, has a right to an opportunity

to be heard, a fair and dispassionate investigation, and a reasonable exercise of the judicial discretion; but his relation to the tribunal, and the character and purpose of the inquiry, are such, that unless it clearly appears that his rights have in some substantial way been denied him, the action of the court will not be set aside upon review.' " *Statewide Grievance Committee* v. *Presnick*, 216 Conn. 127, 131–32, 577 A.2d 1054 (1990), quoting *In re Durant*, 80 Conn. 140, 149–50, 67 A. 497 (1907). The defendant has not shown that the trial court's predicate findings were clearly erroneous. We therefore decline to disturb the court's conclusion that, viewed as a whole, the defendant's conduct constituted professional misconduct.

IV

The defendant's last claim is that DR 1-102 (A) (6) and DR 7-101 (A) (3) are unconstitutionally vague and violate the fourteenth amendment to the United States constitution. Disciplinary Rule 1-102 (A) (6) states: "A lawyer shall not . . . [e]ngage in any other conduct that adversely reflects on his fitness to practice law." Disciplinary Rule 7-101 (A) (3) states: "A lawyer shall not intentionally . . . [p]rejudice or damage his client during the course of the professional relationship, except as required under DR 7-102 (B)." " 'It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.' " (Emphasis omitted.) *Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 289, 102 S. Ct. 1070, 71 L. Ed. 2d 152 (1982). The defendant argues that DR 1-102 (A) (6) does not articulate what constitutes conduct affecting a lawyer's fitness to practice law and that DR 7-101 (A) (3) does not indicate what conduct would prejudice or damage the complainant.

"The fact that the meaning of the language is fairly debatable is not enough to satisfy the burden of proof

[that a rule is unconstitutionally vague]." *Bottone* v. *Westport,* 209 Conn. 652, 658, 553 A.2d 576 (1989). "Lack of precision . . . is not, in or of itself, offensive to the requirement of due process." *Seals* v. *Hickey,* 186 Conn. 337, 344, 441 A.2d 604 (1982). Furthermore, "[l]awyers are chargeable for deviations from the codes governing their conduct, even though the application of the canons to particular circumstances may not be readily apparent. See *Grievance Committee* v. *Rottner,* 152 Conn. 59, 65–66, 203 A.2d 82 (1964)." *Patterson* v. *Council on Probate Judicial Conduct,* 215 Conn. 553, 567, 577 A.2d 701 (1990). Furthermore, a challenge for vagueness is determined according to the particular facts at issue. *State* v. *Proto,* 203 Conn. 682, 696, 526 A.2d 1297 (1987). In the context of this case, we conclude that an attorney should be aware that failing to inform a client of outstanding disbursements and legal fees, arranging the terms of the purchase of a client's real estate as a device to satisfy those fees, and discouraging another potential buyer is conduct that would "[p]rejudice . . . his client" and would "adversely [reflect] on his fitness to practice law" within the meaning of DR 7-101 (A) (3) and DR 1-102. Under the circumstances here readily evident, the defendant has not met his heavy burden of proof that the disciplinary rules are so vague as not to alert him that his behavior constituted professional misconduct.

The judgment of the trial court is affirmed.

In this opinion the other justices concurred.

14101

STATEWIDE GRIEVANCE COMMITTEE : SUPREME COURT

vs. :

ZBIGNIEW S. ROZBICKI : JULY 19, 1991

MOTION FOR REARGUMENT

The Defendant moves for reargument on the following grounds:

(a) This Court's holding in footnote 3, never claimed by the Plaintiff at trial or on appeal, that reference to specific rules of professional conduct does not constitute the only basis for a finding of professional misconduct, violates the defendant's right to due process of law under the Fourteenth Amendment.

(b) This Court's holding in footnote 3 misconstrues the Preamble to the Code of Professional Responsibility and the Preface to the Rules of Professional Conduct.

(c) A crucial admission by plaintiff's counsel at oral argument was not taken into account in the decision, so the application of DR 5-104 against the defendant violates his federal due process rights.

(d) The trial court's finding against the defendant in Count I is not what the plaintiff alleged, in violation of the due process clause of the Fourteenth Amendment.

(e) DR 1-102(A)(6) and DR 7-101(A)(3) are unconstitutionally vague under the Fourteenth Amendment.

1. Brief History

In this grievance case, the defendant was found guilty of professional misconduct and suspended from the practice of law for three months. On appeal this Court affirmed. 219 Conn. 473.

2. Specific Facts

The presentment alleged violations of specific sections of the Code of Professional Responsibility in 1982 and 1985. The plaintiff never claimed in the trial court or on appeal, and the trial court never held, that the defendant could be disciplined for conduct that

did not violate a specific section of the Code. Yet this Court held, 219 Conn. at 476-77, note 3:

> In a presentment for attorney misconduct, reference to specific sections of the Code of Professional Responsibility is not required. Because of its sui generis character, the reference to specific rules of professional conduct within the context of a presentment does not, unlike a criminal statute, constitute the only basis for a finding of guilt, but serves rather to assist the trial court in making its own conclusions as to whether, under the totality of the circumstances, professional misconduct has occurred. The Code of Professional Responsibility, in force at the time of the defendant's purchase of the complainant's home, did not attempt to define the full measure of behavior that would constitute misconduct.

In Count I, the plaintiff charged the defendant with "Receiving real property in satisfaction of a legal fee from a client not represented by independent counsel" in violation of DR 1-102(A)(5) and (6) and 5-104 (R. 9-10). During trial the court assured counsel that it would stick to the four corners of the complaint. After trial, the trial court found that the defendant violated DR 1-102(A)(6) but not DR 5-104 in failing to disclose the cost of the appeal and to make a unequivocal effort to advise the complainant of independent counsel (R. 72).

Concerning the third count, the trial court found that the complainant orally asked the defendant to buy the property in question on January 18, 1985. The defendant orally agreed to do so on that date but advised her to retain other counsel. The court further found, contrary to the plaintiff's claim, that the other counsel was not a pawn of the defendant. Thus when the complainant and the defendant entered into the written real estate contract on January 22, 1985, the complainant was represented by independent counsel in the transaction (R. 75-84). At oral argument during colloquy with Justice David Shea the plaintiff's counsel admitted that no claim of misconduct was being made for the period before January 22, 1985.

3. Legal Grounds

(a)

A lawyer who is subject to being suspended for three months from the practice of law is "entitled to procedural due process, which includes fair notice of the charge." *Re Ruffalo,* 390 U.S. 544, 550 (1968). In *Ruffalo,* the charge on which he was disbarred was not raised in the case until after the lawyer had testified at length in the case. The U.S. Supreme Court held that the proceedings became a "trap" and the lawyer was denied due process.

Footnote 3 is an even worse trap in this case. The defendant presented his case in the trial court on the basis of the charges made by the plaintiff. The defendant also presented his appeal in this Court on the basis of those charges and the holdings of the trial court. The theory of his presentation in both the trial court and this court was that his conduct did not violate any specific provision of the Code of Professional Responsibility. Now this court says that his presentation missed the whole point. Unlike *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626, 654-55 (1985), the defendant never had an opportunity to respond to this claim. The holding in footnote 3 violates the defendant's right to due process of law under the Fourteenth Amendment of the U.S. Constitution.

Footnote 3 causes another federal due process problem. The defendant's claim about the vagueness of DR 1-102(A)(6) and DR 7-101(A)(3) can be made *a fortiori* about footnote 3. According to that footnote, a lawyer can be suspended if the trial court concludes that "under the totality of the circumstances, professional misconduct has occurred."

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.

Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982). The present situation is even worse, for this Court holds that the enactment (i.e., the Code of Professional Responsibility) is merely

advisory. Thus, not only are the prohibitions "not clearly defined," they are not defined at all.

Furthermore, as the defendant explains in detail in issue (b), there is nothing in the Preamble to the Code, the Preface to the Rules, or the previous decisions of this Court that would have alerted the defendant to the standard he is now held to have violated. In *Zauderer,* supra, 471 U.S. at 653, note 15, the U.S. Supreme Court criticized the vagueness of the Ohio Supreme Court opinion on what lawyers must disclose in an advertisement and stated that "it may well be that for Ohio actually to disbar an attorney on the basis of its disclosure requirements as they have been worked out to this point would raise significant due process concerns." A 90-day suspension is closer to disbarment than to the public reprimand issued in *Zauderer.*

The standards for suspension from practice in Connecticut as enumerated in footnote 3 are void for vagueness under the due process clause of the Fourteenth Amendment to the U.S. Constitution.

(b)

This Court has misconstrued the Preamble to the Code and the Preface to the Rules. Immediately after the Preamble, the Code has a Preliminary Statement, which divides up the Code into Canons, Ethical Considerations and Disciplinary Rules. It is clear from the Preliminary Statement that only the Disciplinary Rules are meant to be the basis for disciplinary action:

> The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession. They embody the general concepts from which the Ethical Considerations and the Disciplinary Rules are derived.
>
> The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute

a body of principles upon which the lawyer can rely for guidance in many specific situations.

The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.

It is further clear that the language in the paragraph in the Preamble quoted by this Court refers to the Ethical Considerations paragraph, for the content of the two is very similar.

The Preface to the Rules of Professional Conduct must likewise be read in conjunction with the immediately following Preamble and Scope. The last paragraph of the Preamble states:

Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

The first paragraph of the Scope states:

The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has professional discretion. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

So read in context, the Preface gives no warrant to the Court's holding that the Rules are merely advisory.

The Code and the Rules were adopted by the judges of the Superior Court to regulate the conduct of lawyers in a comprehensive way. The effect of footnote 3 is to make the Rules less than comprehensive. Moreover, its effect is to make the standards concerning lawyers vaguer at a time when the Rules themselves are being made more specific, such as in the elimination of DR 1-102(A)(6) when the Rules were adopted in 1986.

Finally, the one case cited by this Court does not support the holding at all. The quotation from *In re Peck*, 88 Conn. 447, 457, 91 A. 274 (1914), concerns the procedural mechanisms for hearing grievances, not the substantive grounds for finding a lawyer guilty.[1]

Footnote 3 raises an issue of great importance to the whole Bar. It deserves reargument.

(c)

DR 5-104(A), Limiting Business Relations with a Client, was at the heart of this case. Concerning the more serious claim (Count III), this Court emphasized the "after full disclosure" portion of DR 5-104(A) in rejecting Issue III. 219 Conn. at 486. But the Court should never have reached that phrase in the light of the concession of plaintiff's counsel at oral argument that the defendant did nothing wrong before January 22, 1985. The key phrase in DR 5-104(A) is "*enter* into a business transaction." Without the concession the question would have been: Did the defendant enter into a business transaction on January 18 or on January 22? The complainant was represented by independent counsel on January 22, so DR 5-104(A) was inapplicable at that time because she was no longer his client. Thus, the content or

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[1]If footnote 3 is correct, it is difficult to follow the analysis in *Pinsky v. Statewide Grievance Committee*, 216 Conn. 228, 578 A.2d 1075 (1990). This Court found that Rule 4.2 did not apply to Attorney Pinsky, and so exonerated him. According to footnote 3, that should have been the beginning, not the end, of the analysis.

purpose of documents sent to the complainant's independent counsel on or after January 22, 1985 cannot be the basis for the ethical violations claimed. If the complainant did not agree with these documents, she with the assistance of her counsel could reject them, as indeed she did.

Counsel's concession at oral argument obviated the need to determine whether the transaction was entered into on January 18. Therefore, to apply DR 5-104 violates the defendant's right to due process under the Fourteenth Amendment by finding him guilty of a charge not made.

(d)

In issue II on the appeal, this Court said there was no federal due process violation on Count I because:

> The presentment apprised the defendant that these two transactions were the basis of the grievance committee's allegations of misconduct. There is no question that the factual circumstances that served as the basis of the grievance committee's allegations and the trial court's eventual conclusions were known to the defendant, that all aspects of the two transactions were completely developed at the hearing, and the defendant was given a full opportunity to respond. Under these circumstances, we conclude that the requirements of due process were met.

219 Conn. at 484.

The point is not that the complaint and the decision involved the same two transactions. The point is that the plaintiff alleged one type of misconduct and the court found another. If this Court's opinion is correct, then Attorney Ruffalo should have lost his appeal in the U.S. Supreme Court, for the original and amended complaints both concerned the same transaction (his relationship with an investigator).

Perhaps the plaintiff could have made a more general allegation that would have encompassed the trial court's decision. But it did not, and the defendant, as in *Ruffalo,* relied on what the

plaintiff alleged in presenting his defense. The variance between the charge and the decision is especially crucial since the trial court found that the fee was not excessive and the complainant and the defendant both knew the land was worth about $15,000 (R. 71-72). Thus it is difficult to see the ethical impropriety in the defendant's failure to send the complainant a bill before she conveyed the land to him for payment of his fee. The conviction of a charge not alleged violated the due process clause of the Fourteenth Amendment.

(e)

The trial court's decision on Count I was based solely on DR 1-102(A)(6). Its decision on Count III was based on DR 1-102(A)(6), 5-104 and 7-101(A). In light of counsel's concession, Count III cannot be sustained on DR 5-104. That leaves only DR 1-102(A)(6) and 7-101(A). Just this week this Court found a zoning regulation void for vagueness. *Ghent v. Planning Commission*, 219 Conn. 511, ___ A.2d ___ (1991). If footnote 15 in *Zauderer* questions the vagueness of the Ohio advertising rules, these DR's, standing alone to justify conviction, are *a fortiori* unconstitutionally vague under the due process clause of the Fourteenth Amendment.

The motion for reargument should be granted.

DEFENDANT, ZBIGNIEW S. ROZBICKI

/s/ By: Wesley W. Horton
MOLLER, HORTON & FINEBERG, P.C.
90 Gillett Street
Hartford, CT 06105

ORDER

For good cause shown the foregoing is hereby GRANTED/DENIED.

By the Court,

CERTIFICATION

I hereby certify that a copy of the foregoing was mailed to all counsel of record on July 19, 1991.

/s/Wesley W. Horton

STATE OF CONNECTICUT

SUPREME COURT

NO. SC 14101

STATEWIDE GRIEVANCE COMMITTEE

v.

ZBIGNIEW S. ROZBICKI : SEPTEMBER 19, 1991

ORDER

THE MOTION OF THE DEFENDANT, FILED JULY 19, 1991, FOR REARGUMENT, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY ORDERED DENIED.

BY THE COURT,

/s/ Alan M. Gannuccio
ASSISTANT CLERK-APPELLATE

NOTICE SENT: 9/19/91
MOLLER, HORTON & FINEBERG
FRANCIS J. MACGREGOR
PAUL J. MCQUILLAN
SEYMOUR N. WEINSTEIN
CLERK, NEW BRITAIN J.D.
(436825)
HON. DONALD DORSEY
REPORTER OF JUDICIAL DECISIONS

NO. CV 0436825	: SUPERIOR COURT
STATEWIDE GRIEVANCE COMMITTEE	: JUDICIAL DISTRICT OF HARTFORD/NEW BRITAIN AT NEW BRITAIN
V.	:
ZBIGNIEW S. ROZBICKI	: JUNE 5, 1990

MEMORANDUM OF DECISION

This matter pertains to a Presentment of an Attorney for Misconduct. The complaint for presentment dated April 28, 1988, was returned to the Judicial District of Litchfield on May 10, 1988, by the Statewide Grievance Committee. The Respondent moved to dismiss the complaint on June 10, 1988. The court granted the motion to dismiss on July 1, 1988, based upon the failure of the Statewide Grievance Committee subcommittee to render its proposed decision "within not later than ninety days from the date the panel's determination of probable cause or no probable cause was filed with the Statewide Grievance Committee." Conn. Gen. Stat. Sec. 51-90g(c).

The court found that the grievance panel made a determination that probable cause of misconduct against the Respondent existed on April 30, 1987; that a Statewide Grievance Committee subcommittee conducted a subhearing on August 5, and 6, 1987, but did not render its proposed decision until October 13, 1987, five months and thirteen days after the Grievance panel's determination.

Both the Statewide Grievance Committee and the Respondent appealed. The Supreme Court found error on the appeal but declined to review the errors claimed by Respondent and remanded the case for future proceedings. After the remand to Litchfield the case was transferred to New Britain on September 29, 1989. The court heard preliminary motions and set a trial date for February 20, 1990, to accommodate the testimony of the Complainant who resided in Europe. Commencing February 20, 1990, the court conducted a hearing which took place over 7

hearing days. Both the Complainant and the Respondent testified on direct and cross examination.

The Complainant, Helen Huybrechts, and the Respondent commenced a professional and soccial relationship in the fall of 1978 when Respondent undertook to represent her in a dissolution proceeding. While this proceeding was underway the Respondent represented her in a foreclosure proceeding and arranged to reinstate her mortgage. Thereafter Respondent represented her in a variety of legal matters including tenant problems, efforts to execute on her dissolution decree, a negligence action and various matters acting under a power of attorney during her absence from the United States.

The professional relationship terminated in March of 1985 as a result of a dispute between them occasioned by a contract of sale dated January 22, 1985, wherein Complainant agreed to sell and Respondent agreed to buy the complainants house and some fifty acres of land. On two earlier occasions, the Complainant had quit claimed to the Respondent in payment for legal fees parcels of undeveloped land, respectively, 22 acres on October 31, 1980, and 30 acres on February 24, 1982. A closing, pursuant to the contract of sale occurred on July 5, 1985, after not inconsiderable civil litigation between the parties.

During the period of time between October of 1978 and January of 1985, the Complainant and the Respondent maintained a social as well as a professional relationship. Respondent loaned money to Complainant, advanced money to her for expenses of litigation and for payment of her mortgage and other personal needs.

On November 15, 1985, the Complainant filed a grievance against the Respondent. The Grievance Panel made a finding of probable cause and forwarded it to the Statewide Grievance Committee which dismissed it on January 8, 1987, after finding that the Grievance Panel violated P.A. 86-276 section 7(c) by failing to render its determination within 60 days of receipt of the complaint.

Thereafter Complainant resubmitted her complaint on January 15, 1987. The Statewide Grievance Committee on its own initiative submitted a complaint to the Grievance Panel dated February 10, 1987, based on the same factual allegations contained in Complainants grievance. Both of these complaints were considered by the Grievance Panel for the Judicial District of Litchfield. The panel found probable cause that the Respondent had violated DR 1-102(A)(3), 4, 5, 6; DR 5-103(A); and DR 7-101 and referred the matter to the Statewide Grievance Committee. The Statewide Grievance Committee referred the matter to a subcommittee for the purpose of holding a hearing and rendering a proposed decision. The subcommittee held hearings on August 5, and 6, 1987, and rendered a proposed decision on October 13, 1987. The Statewide Grievance Committee adopted the proposed decision of the reviewing committee on November 19, 1987. The decision recommended that a presentment be filed in the Superior Court with a recommendation that the Respondent be disciplined.

Helen Huybrechts' complaint against Respondent dated January 15, 1987, was in affidavit form and consisted of thirty-five numbered paragraphs. In paragraph 34 she summarized her complaints against Respondent stating that she "...inappropriately transferred two valuable pieces of land to Respondent; has been sued by him for legal fees that I did not agree to pay; that he received money through my divorce proceedings with no accounting to me; I ended up selling my house in Falls Village, Connecticut for approximately $25,000.00 less than I could have if I sold it at arms-length transaction; and I am involved in a lawsuit for legal fees against me in which Attorney Rozbicki claims is owed over $25,000.00 worth of legal fees, all of which totals approximately $125,000.00 as a loss to myself." In paragraph 23 the Complainant also faulted Respondent for delaying the resolution of her mortgage reinstatement "...until he negotiated the land I had deeded him out from under the mortgage."

The Statewide Grievance Committee received a letter from Attorney John Febbroriello, attorney for Helen Huybrechts,

dated December 23, 1986, which indicated that the Complainant, Helen Huybrechts, would also testify that the Respondent took a proprietary interest in the subject matter of litigation pending between the Complainant and her husband and the Complainant and a tenant and that the Respondent informed the Complainant that a particular buyer could not obtain a mortgage which in fact was inaccurate and as a result the Respondent purchased the real estate of the Complainant at a price more favorable to him than if had purchased the property on the open market. On the basis of this letter the Statewide Bar Counsel forwarded its own complaint to the Grievance Panel dated February 10, 1987.

The local grievance panel considered both the complaints before them and Respondents voluminous written reply, Respondent's Exhibit D, and found probable cause to believe that the Respondent committed violations of DR 1-102(A)(3), (4), (5) and (6), DR 5-103A, and DR 7-101. In the summary of probable cause determination forwarded to the Statewide Grievance Committee the panel noted:

> "Complainant alleges that attorney charged an exorbitant fee and obtained real estate from his client without adequate safeguards to ensure that it was an arms length transaction. Further the Complainant alleges that she was not adequately represented, that she had sexual relations with the attorney while the divorce was pending and that the Respondent obtained an interest in her divorce litigation. For further details, please see lengthy documents filed by the Respondent and Complainant itself.

The summary does not include any reference to Complainants allegation that Respondent caused her loss by delaying the resolution of her mortgage reinstatement in order to obtain a release from the mortgage of the land Complainant had conveyed to him on October 31, 1980.

The Statewide Grievance Committee referred the local panels determination of probable cause to a subcommittee for a hearing. The subcommittee conducted hearings on August 5,

and August 6, 1987. The Complainant and the Respondent each represented by counsel appeared and gave testimony. The subcommittee also heard testimony presented by witnesses for the Complainant and Respondent. The complaints of Helen Huybrechts and the Statewide Grievance Committee were consolidated for the purpose of conducting a hearing and rendering a proposed decision. The findings of the subcommittees were not as extensive as the allegation of the two complaints. As a matter of fact, they were very limited.

No specific finding was made about sexual relations between the Complainant and Respondent or that Respondent had billed Complainant for legal fees which she had NOT agreed to pay or that Respondent had NOT accounted for money received from her husband in the divorce proceeding or that Complainant received less than fair market value for the house and land she sold to Respondent in July of 1985, or that Respondent charged exorbitant fees for the legal work he performed for her or that Respondent took a proprietary interest in the subject matter of law suits between Complainant and her husband and Complainant and her tenant or that Respondent informed the Complainant that a particular could not obtain a mortgage which was in fact inaccurate and as a result the Respondent purchased the real estate of the complainant at a price more favorable to him than if he purchased the property on the open market or that Respondent inadequately represented Complainant.

The subcommittee did make specific findings about three real estate transactions between Complainant and Respondent and the facts and circumstances between January and May 1981 wherein Respondent represented complainant in a foreclosure action brought by the Litchfield Savings Bank. Based on these findings the subcommittee of the Statewide Grievance Committee concluded that the Respondent engaged in misconduct in accepting, in satisfaction of legal services rendered to his client, two parcels of property by way of quit-claim deeds prepared by his office while his client was not represented by independent counsel. The reviewing subcommittee also concludes that Re-

spondent's failure to expeditiously attempt to reinstate his client's mortgage resulting in additional late fees being assessed against her, in order to negotiate with the bank a release for that portion of the property she had conveyed to him, also constituted misconduct. The subcommittee additionally concludes that the Respondent engaged in misconduct in determining all of the details of his purchase of his client's home and arranging for her to be 'represented' by counsel to avoid the appearance of a conflict of interest. It is therefore concluded that, based upon the allegations of the complaints and their review by this subcommittee, the respondent has violated DR 1-102(A)(4), (5) and (6), DR 5-104 and DR 7-101(A)(3) of the Code of Professional Responsibility."

These Disciplinary Rules are a separate but interrelated part of the Code of Professional Responsibility adopted by the judges of the Superior Court effective October 1, 1972. The Code of Professional Responsibility was the precursor of the Rules of Professional Conduct which became effective in Connecticut on October 1, 1986. The other parts of the Code are the Canons and Ethical Considerations. The Disciplinary Rules serve as a basis for disciplinary action when the conduct of a lawyer falls below the required minimum standards stated in the Disciplinary Rules. The Disciplinary Rules are mandatory in character. The severity of judgment against one found guilty of violating a Disciplinary Rule should be determined by the character of the offense and the attendant.

DISCIPLINARY RULES

DR 1-102 Misconduct.

(A) A lawyer shall not:

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

DR 5-104 Limiting Business Relations With a Client.

(A) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

DR 7-101 Representing a Client Zealously.

(A) A lawyer shall not intentionally:

(3) Prejudice or damage his client during the course of the professional relationship, except as required under DR 7-102(B).

On November 19, 1987, the Statewide Grievance Committee adapted the proposed decision of the subcommittee which recommended that a presentment be filed in the Superior Court with a recommendation that the Respondent be disciplined. As noted, the complaint for presentment of Attorney Rozbicki for misconduct was filed on May 10, 1988. Ultimately this court conducted a trial de novo over a seven day period with the issues framed by the complaint. These issues were detailed in a three count complaint as follows:

Count I that the Respondent violated DR 1-102(A)(5) and (6) and DR 5-104 of the Code of Professional Responsibility in receiving real property in satisfaction of a legal fee from a client not represented by independent counsel.

Count II that the Respondent violated DR 1-102(A)(4), (5) and (6) and DR 7-101(A)(3) of the Code of Professional Responsibility in failing to expeditiously attempt to reinstate the complaintant's mortgage in order to negotiate a release of that portion of the property the Complainant had conveyed to the Respondent.

Count III that the Respondent had violated DR 1-102(A)(4), (5) and (6) and DR 5-104 in determining all of the details of his purchase of the complainant's home and arranging for her to be represented by counsel to avoid the appearance of a conflict of interest.

The Respondents answer to this complaint denied that he violated any of the cited provisions of the Code of Professional Responsibility. It also denied that he promised Complainant a credit for past or future legal bills in consideration for the conveyance of February 24, 1982. Respondent contends that he accepted the first October 21, 1980 conveyance as full payment for his legal fees incurred prior to and including the contested trial of the dissolution action. He further contends that he accepted the second conveyance February 24, 1982, as full payment for representing Complainant in the appeal taken by husband from the dissolution award.

Respondents answer to the second count denied that he caused the delay from March 8, 1981 to May 19, 1981 in resolving Complainants mortgage foreclosure by his personal negotiations with the bank to obtain a release from the mortgage of the parcel conveyed to him on October 21, 1980. It also denied that Respondent was responsible for the additional late fees incurred by Complainant because of this delay.

Respondents answer to the third count denied all the material allegations of this count.

In addition to his answer, Respondent filed nine special defenses, claiming that Count I and II were barred by laches; that in the hearing conducted by the subcommittee, the subcommittee inappropriately allowed Complainant's attorney to control and prosecute the hearing of August 5, and 6, 1987; that the subcommittee and the Statewide Grievance Committee improperly found probable cause as alleged in Count II noting that the local panel had not explicitly found probable cause on the facts and circumstances presented therein; that the local panels probable cause determination of violations by the Respondent violated Respondents due process rights in that the panel failed to permit Respondent or his attorney to appear before them; that the Statewide Grievance Committee filed a grievance complaint against Respondent without statutory or Practice Book authorization.

Although the present matter is in the form of a civil action, it is an investigation by the court into the conduct of one of its members, not a trial or suit. *In re Durant,* 80 Conn. 140, 147 (1907); *Grievance Committee v. Nevas,* 139 Conn. 660, 665 (1953). Once the complaint has been filed, "the court controls the situation and procedures, in its discretion, as the interests of justice may seem to it to require. It may even act upon its own motion without complaint, and thus be the initiator of the proceedings." *In re Peck,* 88 Conn. 447, 452 (1914). The proceeding is *sui generis. In re Peck,* 88 Conn. supra, 453; *In re Application of Pagano,* 207 Conn. 336, 339 (1988). The court has broad powers over both procedural and substantive matters in disciplinary proceedings. *Grievance Committee v. Goldfarb,* 9 Conn. App. 464, 471 (1987).

As the proceeding is an investigation by the court into the conduct of one of its officers, there are no adversary parties. *In re Application of Pagano,* 207 Conn. 336, 340 (1988); *In re Application of Dodd,* 131 Conn. 702, 705 (1945); *Heiberger v. Clark,* 148 Conn. 177, 182 (1961). See also *Grievance Committee v. Broder,* 112 Conn. 263, 265 (1930) as to the Grievance Committee's role being in no sense that of a party but charged with the performance of public duty in a disinterested and impartial manner.

"In the absence of prescribed regulations the manner of the proceeding, so that it be without oppression or injustice, is for the court itself to determine." *In re Durant,* 80 Conn. 140, 148 (1907). The breadth of the court's power over an attorney's privilege to practice is so vast that it extends to a complaint presented by a grievance committee to the court upon the same transactions for which that committee issued a reprimand to the defendant. *In re Horwitz,* 21 Conn. Sup. 363 (1959).

Once jurisdiction is established, the court proceeds in accordance with its inherent and statutory authority and the grievance committee proceedings become of limited importance, at most. *Statewide Grievance Committee v. Presnick,* 18 Conn. App. 316, 321 (1989). See, also, *Statewide Grievance Committee v. Rozbicki,* 211 Conn. 232, 242 (1989) where the dismissal of this presentment was reversed as the court was not deprived of subject

matter jurisdiction despite failure of the committee to comply with the time mandates of Conn. Gen. Stat. Sec. 51-90g(c).

The limit upon the court in a grievance proceeding before it is the exercise of its discretion. See, *Goldfarb,* supra. Also, in *Sturman v. Socha,* 191 Conn. 1, 7 (1983), the court, in discussing a trial court's exercise of discretion concerning proceeding with trial stated:

> [D]iscretion "imports something more than leeway in decision-making."..."Judicial discretion...is always legal discretion, exercised according to the recognized principles of equity....While its exercise will not ordinarily be interfered with on appeal to this court, reversal is required where the abuse is manifest or where injustice appears to have been done....In essence, the trial judge's discretion should be "exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice." (citations omitted)

Consequently, whatever deviations may have occurred in the proceedings preliminary to the presentment to the court, if subject matter jurisdiction inheres, the authority of powers of the court over the presentment are unaffected. The Statewide Grievance Committee's action is limited to dismissing the complaint before it, reprimanding the attorney or directing the filing of a presentment to court.

The Superior Court has delegated to some extent its investigative function to the grievance committee, *Grievance Committee v. Goldfarb,* supra, at page 473, but it has not reposed that function exclusively in the committee. *Grievance Committee v. Goldfarb,* supra, at page 474 and *In re Peck,* supra, at page 457. The grievance committee, therefore, has not exclusive investigative authority in attorney discipline matters. The committee is but an arm of the court and the court, once having such a proceeding before it, remains in control of the proceedings. *Statewide Grievance Committee v. Rozbicki,* 211 Conn. 232, 238-39 (1989).

On August 5, and 6, 1987, hearings were held before plaintiff with full participation of Respondent. Respondent appeared before the reviewing committee of plaintiff with respect to the matters within the complaint, pursuant to Section 27J of the Practice Book. Respondent had been noticed for all proceedings, he appeared at the hearing and he was apprised of all charges at all times. See, *Grievance Committee v. Sinn,* 128 Conn. 419, 422 (1941) and *In re Durant,* 80 Conn. 140, 148 (1907). As long as the complaint is sufficiently intelligible and Respondent and the court are apprised of the charges the usual formalities and precision of a civil action are not required. *In re Peck,* 88 Conn. 447, 453 (1914). The procedures have accorded Respondent due process and he has had access and participation in all aspects of the previous proceedings. *In re Application of Courtney,* 162 Conn. 518, 523 (1972).

In this disciplinary proceeding, notice and hearing have been provided to Respondent. He has been fully apprised of all charges against him prior to the presentment as well as under the presentment and had the opportunity to counter the charges and did participate at all levels in responding to all charges. Respondent responded to the Litchfield Grievance Panel with an extensive submission (Exhibit D). He appeared at the reviewing committee hearing on August 5, and 6, 1987, and he was properly served herein.

The grievance proceedings were conducted in accordance with the rule of practice. The complaints against defendant were forwarded by Statewide Bar Counsel to the local panel, Practice Book Section 27F(a)(1), the local panel made a probable cause determination, Practice Book Section 27F(c), and forwarded same to the Statewide Grievance Committee.

The Statewide Grievance Committee assigned the record from the panel to a reviewing committee, Practice Book Section 27J(a), held a hearing on the complaints, Practice Book Section 27J(c), and permitted counsel for Complainant and Respondent to examine and cross-examine witnesses, Practice Book Section 27J(d). The Statewide Grievance Committee rendered a decision

to present Respondent to the court, Practice Book Section 27J(e) and *Statewide Grievance Committee v. Rozbicki,* 211 Conn. 232 (1989).

Respondent was not prejudiced in any of the proceedings as the charges were the same. He was not deprived of his "due process" rights.

Plaintiff Committee was not bound by the original Complainant's charge nor that of the grievance panel but may initiate its own inquiry or apply its own reasoning to the evidence presented. See *Zauderer v. Office of Disciplinary Counsel,* 105 S. Ct. 2265, 2284 (1985) sustaining a committee's right to make its own recommendations to present to the court responsible for discipline. Respondent had notice and opportunity to respond to all issues raised before plaintiff and has had the same notice and opportunity before this court. Due process has been preserved.

See, also, *Grievance Committee v. Goldfarb,* 9 Conn. App. 464 (1987) where the authority of the trial court to hear matters raised subsequent to the conclusion of grievance proceedings and at presentment were sustained. At pages 471 to 473.

The court concludes that Respondent has failed to sustain his burden of proof as to all of his special defenses.

Laches is not a defense to a presentment of an attorney for misconduct. See, Delay in Disciplinary Proceedings, 93 ALR3 1057, Section 4 et seq.; Attorneys at Law, 7 Am. Jur. 2d Section 89; *Mrakich v. State Bar,* 106 Cal. Rep. 497, 506 P.2d 633 (1973); *Legal Ethics Committee v. Pence,* 240 SE.2d 668, 672 (WVA, 1977).

The reviewing committee may request examination and cross-examination of witnesses by Complainant and Respondent. Practice Book Section 27J(d).

There is no requirement that the Committee or its reviewing committee have witnesses and evidence presented by Statewide Bar Counsel.

Neither practice book nor statute restricts the reviewing committee to the probable cause finding of the grievance panel.

See, *Goldfarb,* supra, at 471-472; *Zauderer v. Office of Disciplinary Counsel,* 105 Sup. Ct. 2265, 2284 (1985).

A grievance panel prior to issuing its determination of probable cause or lack of same is not required to hold a hearing. Its determination is reviewable by the Statewide Grievance Committee or a reviewing committee which conducts a hearing. Practice Book Section 27J(c). At such hearing the respondent is entitled to be heard. Practice Book Section 27J(d). In this particular matter he was heard and participated fully including the examination and cross-examination of witnesses.

Any person may file a written complaint alleging misconduct. Practice Book Section 27F(a). No restriction is placed upon the Complainant's status.

Respondent's due process rights have not been violated. He has been noticed for all proceedings and he appeared at a hearing and was apprised of all charges at all times. *Grievance Committee v. Sinn,* 128 Conn. 419, 422 (1941); *In re Durant,* 80 Conn. 140, 148 (1907). The procedures unquestionably accorded Respondent due process. *In re Application of Courtney,* 162 Conn. 521, 523 (1972). Indeed, he is before the court for examination with sufficient notice of the charges.

Respondent has not been reprimanded by the Statewide Grievance Committee. He has been presented to court for a hearing on the merits. The court may, after hearing, dismiss the complaint or impose discipline, to wit, reprimand, suspension, disbarrment or such other discipline as the court deems appropriate. Practice Book Section 31(a).

Despite the limited scope of the complaint the hearing before the court was wide ranging. Both the Complainant and the Respondent testified at length concerning the length and breadth of their six and one-half year social and professional relationship. Each had the benefit of their prior testimony before the Statewide Grievance subcommittee. They also had available to them the testimony of parties and witnesses in civil suits between Robinson Leech and the Respondent and the Complainant and

the Respondent stemming from the same set of facts which gave rise to this presentment. The Complainant and the Respondent frequently gave contradictory testimony but they were in agreement in several areas.

The Complainant, Helen Huybrechts, was chronically with out funds. In 1978 her husband abandoned her and refused to respond to court orders requiring him to pay alimony including the mortgage, insurance and tax obligations on their jointly owned family home. This situation resulted in the Respondent advancing her funds to meet her personal needs from time to time as well as making direct mortgage payments to her bank in the latter part of 1984 to prevent the loan from falling into default. Respondent also advanced costs to her for legal expenses particularly with regard to her efforts to realize satisfaction on her judgment against her former husband.

Both the Complainant and Respondent were in agreement that the Respondent had handled a difficult and complicated dissolution action with professional competence. At the trial level, Respondent obtained pendente lite orders, satisfied some of them by contempt orders and obtained a favorable property settlement for Complainant which gave her sole title to her home and acreage in Falls Village. The decree resulted in an appeal by her husband. Complainant retained Respondent to defend her judgment which he did successfully obtaining a dismissal of the appeal in the Supreme Court of Connecticut. Respondent then sued her former husband on the judgment and obtained a default judgment against him and attempted to garnish a creditor of her husband. At the trial level Respondent received an adverse decision but this decision was overturned on appeal and funds in excess of $30,000.00 became available June of 1985 and were placed in escrow for future distribution between Complainant and Respondent.

Both Respondent and Complainant further agreed that Complainant made no formal complaint about any of the transactions specified in the presentment complaint until November of 1985 at which time she was engaged in a civil dispute with Respon-

dent concerning the entitlement to funds in the aforementioned escrow account. The Respondent and Complainant further agreed that Complainant had frequently urged Respondent during the course of their relationship to buy the dwelling and acreage remaining in her name after the two conveyances to respondent, the first 22 plus/minus acres in October 1980, the second 30 acres in February 1982. The remaining property consisted of a dwelling and some 50 acres. The escrow account initially was created to hold funds representing a disputed invoice for legal services rendered in March 1985 by Respondent to Complainant over a period from 1982-1985. These disputed bills for legal services totaled $8,000.00. The escrow account set up at the closing was augmented by the funds (in excess of $30,000.00) which had been successfully garnished by Respondent.

The areas of disagreement between Complainant and respondent are manifold. Complainant testified that Respondent never established a fee basis for the services he rendered. Respondent contends he informed her his billing rate was $100.00 per hour. Complainant insists she received no formal billing and knew next to nothing about the charges she incurred for her dissolution, her appeal, her tenant problems, miscelleanous legal matters and, of course, her lawsuit against her husband which involved the garnishment. Respondent contends that he kept Complainant fully informed of all her legal matters and repeatedly advised of the personal advances he was making in her behalf and of the legal expenses she was incurring. Complainant testified that Respondent offered her prepaid legal services in the future in exchange for her transfer to him of a 30 acre parcel of land conveyed on February 24, 1982, when the issue of a fee for the dissolution appeal was resolved. Respondent denys that the arrangement involved anything other than a conveyance of land in payment for legal services connected with the appeal. The committee submitted testimony as to values for this land and another parcel of land which Helen Huybrechts conveyed to Respondent on October 21, 1980, at variance with the values submitted by Respondent. Since both of these conveyances were prepared by Respondent and executed in his office without the

benefit of formal real estate appraisals and without Complainant having independent legal counsel Complainant contends they were improper. Respondent denies any impropriety in either of these transactions. He testified directly that he suggested that Complainant obtain independent counsel for each transaction and offered additional testimony to corroborate his testimony. Complainant denied that Respondent suggested or recommended she obtain independent counsel or appraisals. Complainant asserted in her testimony that Respondent's efforts to obtain a release of the mortgage of the property conveyed to him on October 21, 1980, caused a delay in her efforts to reinstate this mortgage on her remaining property which was then under foreclosure threat. This delay she contends resulted in increased late fees accruing against her account. Respondent contends that there was no delay and if there were one the damage was minimal.

In early 1985 when Complainant agreed to sell her remaining land to Respondent, Complainant contends that Respondent secured a figurehead outside counsel so as to avoid the appearance of a conflict of interest.

In the hearing before the Statewide Grievance Committee these areas of disagreement were determined against the Respondent on a probable cause basis, that is, the committee determined that Respondent's actions involved a probability of misconduct. *State v. Heinz,* 193 Conn. 612, 616. This standard is less than the standard of whether a prima facie case is made out but measures the conduct in issue to determine whether or not there is a *fair probability* that the person complained against committed the proscribed activity. *State v. Bellamy,* 4 Conn. App. 520, 525. "Probable cause is a flexible common sense standard. It does not demand that a belief be correct or more likely true than false." *Goodwin v. Pratt,* 10 Conn. App. 618, 621. The role of the Statewide Grievance Committee at the hearing involving the Respondent was to determine probable misconduct by weighing probabilities.

> Generally, facts which constitute a crime need not be proven beyond a reasonable doubt if they are at issue in

> a civil action. 30 Am. Jur. 2d, Evidence Section 1169. It is ordinarily sufficient in civil cases to prove the existence of the criminal act by a preponderance of the evidence. *Mead v. Husted,* 52 Conn. 53, 56 (1884). "However, *clear and convincing proof is a* standard frequently imposed in civil cases where the wisdom of experience has demonstrated the need for greater certainty, as where this high standard is required to sustain claims which have serious consequences or harsh or far-reaching effects on individuals, to prove willful, wrongful and unlawful acts, to justify an exceptional judicial remedy, or to circumvent established legal safeguards..." (Footnotes omitted.) 32A C.J.S., Evidence Section 1023; see, e.g., *Dacey v. Connecticut Bar Assn.,* 170 Conn. 520, 368 A.2d 125 (1976).

Schaffer v. Lindy, 8 Conn. App. 96, 104.

In presentments brought to the Superior Court the standard of proof applicable to disciplining lawyers is *clear and convincing proof* that misconduct has occured. *Statewide Grievance Committee v. Presnick,* 18 Conn. App. 316, 323. Such a standard requires more than proof by a *preponderance of evidence.*

> "A standard of proof allocates the risk of error between the litigants and indicates the relative importance of the ultimate decision. *Addington v. Texas,* 441 U.S. 418, 423, 99 S. Ct. 1804, 1808, 60 L. Ed. 2d 323 (1979). For example, the 'proof beyond a reasonable doubt' standard implies that the party on whom that burden is imposed should bear almost the entire risk of error. Id. at 423-24, 99 S. Ct. at 1808. In contrast, the 'preponderance of the evidence' standard indicates that the litigants should share equally the risk of error, id. at 423, 99 S. Ct. at 1808, because the interests at stake have roughly equal societal importance. *Santosky v. Kramer,* 455 U.S. 745, 787, 102 S. Ct. 1388, 1411-12, 71 L. Ed. 2d 599 (1982) (Rehnquist, J., dissenting). Proof by 'clear and convincing' evidence is an intermediate standard generally used in civil cases involving allegations of fraud or some other quasi-criminal wrong-

> doing, or when particularly important individual rights are involved. *Addington,* 441 U.S. at 424, 99 S. Ct. at 1808." *United States v. Schell,* 692 F.2d 672, 676 (10th Cir. 1982) (preponderance of the evidence standard, constitutional in "dangerous special offender" proceeding to enhance defendant's criminal sentence).

Cookson v. Cookson, 201 Conn. 229, 234.

> The phrase "clear and convincing proof" denotes a degree of belief that lies between the belief that is required to find the truth or existence of the issuable fact in an ordinary civil action and the belief that is required to find guilt in a criminal prosecution. One court has suggested that "clear and convincing proof" is "strong, positive, free from doubt," and "full, clear and decisive." *Stone v. Essex County Newspapers, Inc.,* supra. Those phrases tend to distinguish the applicable burden of persuasion from others but they also tend to focus on the nature of the evidence rather than on the trier's state of mind. For this reason the burden of persuasion should be phrased in a manner similar to the way in which the burden for an ordinary civil action was expressed in *Darrow v. Fleischner,* 117 Conn. 518, 520, 169 A. 197. The burden of persuasion, therefore, in those cases requiring a showing of clear and convincing proof is sustained if evidence induces in the mind of the trier a reasonable belief that the facts asserted are highly probably true, that the probability that they are true or exist is substantially greater than the probability that they are false or do not exist.

Dacey v. Connecticut Bar Assn., 170 Conn. 520, 536-537.

The first count of the complaint for presentment charges that Respondent violated DR 1-102(A)(5) and (6) and DR 5-104 of the Code of Professional Responsibility in receiving real property in satisfaction of a legal fee on two occasions from a client not represented by independent counsel. The first transaction occurred on October 21, 1980. There is no question the Complainant Helen Huybrechts executed a quit claim conveyance

prepared by Respondent conveying some 22 plus/minus acres to Respondent. There is no question that the conveyance took place in Respondent's office and that the grantor Helen Huybrechts was not represented by independent counsel at the time.

There is a dispute as to whether Respondent advised her to obtain independent counsel. Respondent does not contend he suggested she obtain an independent current real estate appraisal of the parcel.

This conveyance was by agreement of the parties in satisfaction of legal fees incurred by Complainant in the dissolution of her marriage. Respondent had presented a bill to Complainant on July 25, 1980, at the time of trial of a contested dissolution hearing before a State Trial Referee. This bill was for approximately $25,000.00. Both parties were aware that the Complainant was without funds to pay the bill. When the parties commenced their legal relationship in 1978 Respondent acknowledge that Complainant was without funds and did not demand a retainer but quoted an hourly rate for legal services and expressed his opinion that he would strive to obtain counsel fees from Complainant's husband. He did this with the trial courts sanction and on two occasions, June 22, 1979 and December 21, 1979, obtaining a total of $1,622.15 in legal fees and costs. Respondent also indicated to Complainant in late 1978 that perhaps they could work something out by way of a fee arrangement whereby Complainant would grant a parcel of land to him in consideration of his fee.

Complainant was not unaware during the course of the dissolution proceedings that she was incurring substantial legal fees. She signed financial affidavits on four occasions representing to the court that she was indebted to Respondent: January 12, 1979 – $1,000.00; August 6, 1979 – $2,500.00; December 20, 1979 – $8,500.00 plus litigation costs of $350.00; and, July 20, 1980 – $18,500.00 plus litigation costs of $2,550.00. She had been given a statement of account dated July 25, 1980 showing hourly charges from November 16, 1978 through July 25, 1980 for 309 1/2 billable hours at $75.00 per hour for a total fee of

$23,212.50 and litigation costs of $1,865.88 for a total fee of $25,078.30. She did not contest the fee then. The presentment does not charge the fee was excessive and no evidence was offered at the hearing on what would have been a reasonable fee for the services rendered. The Code of Professional Responsibility on that date did not prohibit a fee paid in property rather than in money nor does the current Code of Professional Conduct. Nevertheless in a fiduciary arrangement involving payment of a fee by a medium other than cash a strict scrutiny by the court is called for. Testimony was offered to establish the value of the land. Complainant was aware of the purchase price that she and her husband paid for the entire tract in June 1977. In June of 1977 they acquired an estimated 130 acres for $115,000.00. She also knew that Arthur P. Oles of Oles Appraisal Associates had submitted a written appraisal on June 24, 1980 to Respondent indicating the property, the dwelling and the acreage was evaluated at $140,000.00 as of that date and that Mr. Oles had so testified at the hearing in July before Justice Thim.

The court finds this appraisal (Exhibit S) to be the most credible evidence of the value of the 22 acres conveyed to Respondent. Oles determined this land to be excess acreage to that needed for the dwelling parcel of 10 acres and to be above grade with poor soil characteristics including ledge. Based on Oles appraisal the parcel was worth $500.00 per acre or approximately eleven to twelve thousand dollars. In his memorandum of decision dated November 25, 1980, Justice Thim noted that prior judicial awards of attorney fees had been ordered to Respondent

August 6, 1979 – $250.00 second contempt
September 11, 1979 – $500.00 Ne exeat
December 20, 1979 – $300.00 third contempt
December 20, 1979 – $75.00 compliance of disclosure.

In addition to ordering the payment of these attorney fees, the court ordered the Respondent to pay counsel fees to plaintiff's (Complainant's) counsel $12,500.00 plus costs and expenses of $1,858.88.

Based on this analysis, the court cannot find that the value of the land transferred to Respondent by Complainant on October 30, 1980 was grossly in excess of the value of the services rendered by Respondent to Complainant. A reasonable interpretation of DR-104 entitled "Limiting Business Relations with a Client" convinces the court that it is inapplicable to the facts and circumstances involved in this transfer which appears to be governed by DR 2-106 "Fees for Legal Services". These facts and circumstances would not permit the court to find a violation of DR 1-102(A)5 that Respondent engaged in conduct that is rejudicial to the administration of justice or DR 1-102(6) that Respondent engaged in any other conduct that adversely reflects on his fitness to practice to law.

The second transaction referred to in the first count took place on February 24, 1982. The same allegations of misconduct which were attributed to the October 30, 1980 transaction are ascribed to Respondent as to this conveyance, i.e., a violation of DR 1-102(A)(5)(6) and DR 5-104 of the Code of Professional Responsibility. In this instance the conveyance was by agreement of the parties in satisfaction of legal fees subsequent to the dissolution judgment of November 25, 1980.

Francois Huybrechts, the husband of the Complainant, Helen Huybrects, took an appeal from this judgment. The Complainant was without funds to pay legal costs for her representation in the post judgment proceedings and appeal. The Respondent undertook representation of Complainant in this matter and completed his work on or before February 24, 1982. On March 1, 1982, the Supreme Court dismissed the appeal of Mr. Huybrechts. Up to this time Respondent had never presented a bill for services to Complainant. Respondent contends that the same billing arrangement was in effect posttrial judgment as pretrial judgment that is billing on an hourly basis. He also contends that Complainant was aware of costs of the defense of this appeal because of her attendance at post judgment hearings before Justice Thim.

At one of these hearings Respondent presented a bill to the court in the amount of $9,000.00. (Exhibit Y). This exhibit is dated March 2, 1982, one day after the Supreme Court dismissed the appeal. On April 29, 1982, Justice Thim awarded counsel fees of $5,500.00 to Helen Huybrechts. Respondent prepared the deed, dated February 24, 1982, it was executed in his office and Complainant was unrepresented by independent counsel. The complaint does not charge that the fee was excessive. The only evidence offered at the hearing suggestive of its value is the ruling of Justice Thim allowing $5,500.00 for counsel fees. The land in question was the subject of testimony by Robinson Leech, a realtor, who indicated it was worth between $500.00 to $1,000.00 per acre. Arthur Oles, the author of Exhibit S, testified that he evaluated it as $500.00 per acre as of April of 1981. The court finds that by the most credible evidence the land had a value of about $500.00 per acre. If anything, because of its swampy character, it may have been worth slightly less.

In contrast to the prior transaction of October 31, 1980, the Respondent never submitted a bill advising Complainant her incurred costs of his services in defending the appeal. In instances such as this when land is being transferred for legal services of undisclosed value, [the court finds that both the Complainant and Respondent knew the land was worth approximately $15,000.00] a client is entitled to something more than a vague assurance that "I'll never charge you more than the land is worth."

As in the prior deed, the court cannot construe the facts and circumstances involved in the conveyance of February 24, 1982, to be a violation of DR 104, "Limiting Business Relations with Client." Here again, the transfer is governed by DR 2-106, Fees for Legal Services. Applying the strict scrutiny test to this transaction the court finds that the Respondent failed to disclose fully to Complainant her incurred costs for the appeal and also failed to make an unequivocal effort to assure that Complainant obtained independent counsel before transferring a second parcel of land to him for an undisclosed fee. Such misconduct adversely reflects on his fitness to practice law. DR 1-104(A).

The second count of the complaint for presentment relates to the activities of the Complainant and Respondent between January 1981 and May of 1981. In July of 1980, during the contested dissolution hearings Complainant was served with a foreclosure complaint by the Litchfield Savings Bank. The bank had given a mortgage for $75,000.00 on the entire property when Complainant and her husband bought the property in 1977. After the Complainant commenced her dissolution proceedings in late 1978 her husband permitted the mortgage to go into default despite court orders that he pay the mortgages, insurance, taxes, in addition to periodic alimony.

If the foreclosure were pursued to judgment both Complainant and Respondent would suffer a loss. Respondent had acquired a 22 plus/minus acre parcel from Complainant in October 1980 in consideration of his fee for the dissolution. This parcel was subject to the mortgage as was the balance of Complainants holdings. Respondent commenced negotiations with the bank and was advised by its counsel the amount necessary to reinstate the mortgage as of February 1, 1981. The Complainant had no funds available to pay off the accrued arrears, late fees, costs and attorneys fees which totaled $11,114.53. Subsequently, Complainant obtained funds totaling $14,500.00 which she forwarded to Respondent on or about March 6, 1981. Respondent did not forward these funds to the bank until May 19, 1981. This payment reinstated the mortgage and enabled Respondent to obtain a release of his 22 plus/minus acre parcel from the lien of the mortgage. The Complainant was ultimately liable for two months late fees at the rate of $26.03 per month because payment was delayed from March 6, to May 19, 1981. The actual difference in late fees paid by Complainant was $364.42 but the court was offered no evidence to substantiate the propriety of this charge. The Statewide Grievance Committee charged in the second count that the Respondent failed to expeditiously attempt to reinstate the Complainant's mortgage in order to negotiate a release of his 22 plus/minus acre parcel from the lien of the mortgage in violation of DR 1-102(A)(4)(5) and DR 7-101(A)(3) of the Code of Professional Responsibility.

The court finds the Respondent obtained the reinstatement of the mortgage and concurrently the release of his parcel from its lien in a reasonably expeditious manner considering all the circumstances; the need to clear Complainants funds, the requirement of obtaining financial documentation from Complainant and the temporary absence due to vacation of bank's counsel. Although some delay might be attributed to Respondents efforts to obtain a release of his property the court cannot find it to be material or of sufficient weight to constitute misconduct involving dishonesty, fraud, deceit, or misrepresentation, DR 1-102(A)(4) or conduct prejudicial to the administration of justice, DR 1-102(A)(5) or reflecting on fitness to practice law DR 1-102(A)(6). Insofar as DR 7-101(A)(3) is concerned, the facts proved under count 2 do not justify a finding that Respondent intentionally prejudiced or damaged his client in any material way during the course of their professional relationship. Respondent alleged and the court finds proven that no specific charge was ever made for this transaction.

The third count of the complaint for presentment of the Respondent for misconduct refers to the circumstances and events which resulted in the Complainant Helen Huybrechts and the Respondent entering into a contract for the sale of the dwelling and remaining land of the Complainant. This contract of sale was signed on January 22, 1985, by Helen Huybrechts, seller and Z. S. Rozbicki, trustee, buyer.

The purchase price stated in the contract was $232,500.00, the stated deposit was $10,000.00. The contract contained a mortgage contingency clause and an agreement for a March 1 closing date at which time possession of the premises free from all tenants and occupants was to be delivered by the seller. Paragraph 12 contained a representation by purchaser that no broker was the procuring cause of the contract. Paragraph 13 was entitled credits to purchaser. It contained an agreement that the purchaser shall receive a credit against the purchase price of $7,500.00 representing an allowance for repairs.

The printed form emboding this agreement was embellished with a letterhead entitled "Law Offices of Gradowski & Miles, New Milford, Connecticut. Attorney Walter Gradowski prepared the contract and attended the execution of it after receiving a telephonic request from the Complainant Helen Huybrechts represent her in the transaction. The Respondent suggested to Complainant that she retain Mr. Gradowski and discussed his fee arrangments with him. Respondent provided Attorney Gradowski with the essential terms and conditions of the contract. Attorney Gradowski examined the land records in order to prepare a legal description of the land.

Four days earlier, January 18, 1985, the Respondent had sent a letter to Complainant providing her with a run down of actual out of pocket advancements made on her behalf totaling $5,317.05 (Exhibit II). Respondent noted that this figure did not include any attorney's fees with the one exception of an out of pocket payment of an Oregon attorney's fee paid by Respondent in Complainant's behalf.

The Complainant was unable to vacate the premises by March 1, 1985, so the closing was put over to Monday the 4th day of March. The closing did not take place on March 4, 1985, because of a dispute over adjustments proposed by the respondent. On March 2, 1985, the Respondent prepared a statement of account of the legal fees the Complainant had incurred with him covering the period September 10, 1982 through February 28, 1985, amounting to $7,900.00 (Exhibit 23). Attorney Gradowski incorporated this statement into a proposed closing statement dated March 1, 1985 (Exhibit 21) and a closing statement dated March 4, 1985 (Exhibit 22), both of which were unacceptable to Complainant. No closings took place on these dates. On or about March 4, 1985, Complainant discharged Attorney Gradowski and hired new counsel. The adjustments in dispute involved fees for legal services of $7,900.00, six of Complainants mortgage payments to Litchfield Savings totaling $3,905.22, counsel fees advanced to an Oregon attorney of $872.45, costs advanced for a garnishment action against Travelers Insurance

Company to obtain funds of Complainants former husband of $390.45 and $170.15, court costs in a property damage matter, and cash loans to the Complainant of $3,040.00.

Ultimately, a closing of title was effected between Complainant and Respondent on July 3, 1985. At this closing an escrow account in the amount of $13,500.00 was established with the funds escrowed in the possession of an attorney representing *claimant.* The closing was made possible as a result of a stipulation submitted to the Superior Court in the Judicial District of Litchfield on June 19, 1985. Rising out of two lawsuits: the first Helen Huybrechts v. Zbigniew Rozbicki, R. date June 25, 1985; and the second, Zbigniew Rozbicki v. Helen Huybrechts, R date May 28, 1985, both of these lawsuits sought specific performance of the contract of sale dated January 22, 1985.

The closing adjustment reflected a credit to buyer for $5,000.00 in contrast to the contract recitation, a credit for repairs in the amount of $7,500.00 which corresponded to the contract, plus out of pocket expenses and cash advances made by the Respondent which together with escrow funds were provided for in the stipulation but were not part of the original contract of sale.

The third count of the complaint related chronologically the critical path followed by Complainant and Respondent which led to the signing of the contract of January 22, 1985. Complainant signed an exclusive listing agreement with Robinson Leech Associates on June 10, 1984 (Exhibit CC), listing her property at $260,000.00. She signed a co-exclusive listing agreement on January 1, 1985, listing her property at $269,000.00. Both of these contracts permitted Complainant to sell the property to a buyer without payment of a commission if the agent was not the procuring cause of the sale.

The agent was the procuring cause in obtaining a series of offers from one L. Warfield Ogden. Ogden offered $250,000.00 for the property on January 6, 1985. This offer required Complainant to take back a purchase money second mortgage of $37,500.00. This offer was rejected by Complainant almost

immediately upon the advice of Respondent. Thereafter, Ogden amended the offer verbally to eliminate the second mortgage conditioning the offer only on his qualifying for a $225,000.00 first mortgage and Complainant repairing a roof. On January 14, 1985, Ogden applied to the National Iron Bank for a $225,000.00 first mortgage. On January 16, 1985, the bank completed an appraisal and verbally informed Ogden it would approve a $200,000.00 mortgage and would consider a $225,000.00 mortgage if Ogden found a suitable cosigner for $37,500.00. Ogden was confident his father would cosign and be acceptable to the bank. This information was communicated to Robinson Leech, the realtor, and William Manasse, Ogden's attorney. Leech told the Complainant on January 17, 1985 or January 18, 1985, that he was optimistic that Ogden would soon be approved for a $225,000.00 loan but he did not specifically tell her that the bank would require a cosigner for the top $37,500.00. Manasse contacted Respondent on January 17, 1985 and told him the mortgage had been approved but omitted mentioning the cosigner requirement. At this meeting Attorney Manasse was advised by Respondent that Complainant would not repair the roof at the offering price and that respondent was considering purchasing Complainants property for $250,000.00 less the agents commission. Over the years Complainant had repeatedly offered the property to Respondent. During the time frame commencing with Ogden's written offer dated January 6, its rejection and Ogden's verbal offer of January 11, or 12, 1985, eliminating the second mortgage, the Complainant again offered the property to Respondent.

Respondent contacted the National Iron Bank on January 18, 1985, and learned that while the bank had verbally approved a $200,000.00 loan to Ogden it had not received an application from a cosigner. Therefore, the $225,000.00 loan was pending but had not been rejected. Ogden's attorney informed him of Respondents statements regarding Respondents intention of purchasing the property and the disinclination of Complainant to repair the roof. Ogden instructed Manasse to withdraw his offer which he did on January 21, 1985. Ogden subsequently

telephonically withdrew his application for the loan. As of the date of the withdrawal the bank had not received any credit application from Ogden's father.

On January 18, 1985, Respondent agreed to buy Complainants property for $232,500.00 less a credit of $7,500.00 for repairs. Respondent contacted Attorney Gradowski on that date and Gradowski agreed to represent the Complainant in the contractual arrangements which he ultimately did after the Complainant contacted him by phone. As noted earlier, the contract of sale was executed on January 22, 1985.

Complainant criticizes Attorney Gradowski as a pawn or figure head of Respondent but the evidence does not support this charge. Complainant also asserts that she agreed to sell to Respondent only because he represented to her that Ogden's loan had been denied by the bank whereas he characterized himself as a financially able immediate buyer. While the evidence strongly suggests that Respondent was opportunistic it will not support a finding that Respondent misrepresented to her the actual slate of facts existing on January 18, 1985 relative to the status of Ogden's loan application for a $225,000.00 first mortgage.

Paragraph 35 of the third count alleges that Attorney Gradowski's representation of the Complainant was arranged by the Respondent in an attempt to prevent an appearance of a conflict of interest in his purchase of the Complainant's property. Paragraph 36 alleges that Attorney Gradowski's fee was never discussed with the Complainant but only with the Respondent. Paragraph 38 asserts that Attorney Gradowski's only contact with Complainant prior to the January 22, 1985 meeting was by way of a telephone conversation to confirm that he would be representing her. Paragraph 39 asserts that the Respondent supplied all the details of contract other than the description to Attorney Gradowski. Paragraph 40 contends that Attorney Gradowski failed to amend the contract although Respondent paid over the sum of $5,000.00 to Complainant instead of the sum of $10,000.00 which was called for as a deposit by the contract.

The Statewide Grievance Committee determined that the allegations of the third count, if proven, constituted misconduct prohibited by DR 1-102(A)(4), (5) and (6); DR 5-104; and, DR 7-101(A)(3) of the Code of Professional Responsibility in that Respondent determined all the details of his purchase of the Complainant's home and arranged for her to be represented by counsel to avoid the appearance of a conflict of interest.

The language of the determination by the Statewide Grievance Committee suggests that the employment of Attorney Gradowski was a sham, a subterfuge to gloss over and conceal from the world a real conflict of interest inherent in a business transaction between a lawyer and his client. The description of the activities of Attorney Gradowski up to January 22, 1985, alleged in paragraphs 35, 36, 37, 38, 39, 40 and 41 suggests that he abandoned his duties to act as independent counsel on behalf of Complainant and was acting in concert with and on behalf of the interests of Respondent. This was the position taken by Complainant on direct and cross at the hearing. The court rejected her characterization of Attorney Gradowski as a figurehead and a pawn. It is true that Attorney Gradowski quoted a legal fee to Respondent when asked if he would be interested in representing Complainant. The court finds nothing improper in this. Attorney Gradowski did not undertake his title search until authorized by Complainant. Prior to the execution of the contract, he explained its terms to Complainant and received her assent to each. Complainant did not dissent when Respondent extended a $5,000.00 deposit instead of the $10,000.00 recited by the contract. Attorney Gradowski's testimony indicated that this reduced deposit was discussed. His recollection was that respondent claimed a credit for advances made to Complainant. Complainant denies this but agrees that she accepted the $5,000.00 with the promise that the balance would be forthcoming within a few days from Respondent. Complainant also admitted that she accepted Respondent's explanation for the $7,500.00 credit in the contract because she knew a tenant had quote "garbaged" the property requiring extensive cleaning and repairs, that she had an estimate for these repairs, that she was

suing the tenant and anticipated that Attorney Rozbicki would recoup these funds in the suit against the tenant. The fact that Attorney Gradowski had only a telephone contact with Complainant prior to his preparing the contract is not unusual or improper in the context of realty transactions of this type.

There was no evidence to indicate to the court that Attorney Gradowski knew anything about the lengthy personal and professional relationship of Complainant and Respondent that had existed over a six year period or that he was aware or had been made aware by Complainant of the two prior real estate transactions between them. There was no evidence presented to the court of any regular social or professional relationship between Attorney Gradowski and the Respondent. Once Complainant became dissatisfied with Respondents proposed adjustments Attorney Gradowski made no effort to persuade her otherwise. The court's conclusion from these findings is that Attorney Gradowski acted in good faith during his limited professional relationship with Complainant and acted in her behalf and not in behalf of the Respondent.

On January 18, 1985, when Respondent agreed to buy Complainants home and remaining land, Respondent was the attorney for Complainant. He was, in fact, advising her concerning a proposed sale of this property to L. Winfield Ogden. He knew that Ogden had a verbal commitment for a mortgage of $200,000.00 and would be able to obtain a $225,000.00 mortgage if he could obtain a cosigner for $37,500.00 of that amount. He was also aware that the repair to the roof of Complainant's home could be completed for $2,500.00 but that Complainant had no money to repair it and would have to adjust the purchase price of the house to satisfy any buyer.

There was evidence which indicated that Complainant was prepared to make such an adjustment but Respondent represented to Ogden's attorney on either January 17, or January 18, 1985, that his client would NOT adjust at a purchase price of $250,000.00. Evidence was offered by Robinson Leech and the Complainant that the Complainant would have agreed to a roof

repair adjustment at the price of $250,000.00 based on the repair figure which Mr. Leech had obtained. Respondent also informed Attorney Manasse that he was considering buying the property. It is NOT at all surprising that Mr. Ogden who had met with Respondent on January 14, 1985 and received little encouragement from him about the prospects for completing a contract of sale was dismayed when his attorney informed him that Respondent was considering buying the property of his client.

Respondent had been involved legally regarding Complainant's listing with Robinson Leech. The listing which became a co-listing was signed by Complainant on January 1, 1985, in his office. Respondent advised his client that the prior June 24, 1984 listing was ambiguous as to whether it was an exclusive right to sell or an exclusive listing or both. The listing of January 1, 1985 was clearly designated as a co-exclusive listing which gave the agent no commission rights to a sale procured by the Complainant and NOT by agent.

While it is a fact that the Complainant was not economically disadvantaged by a sale price to her lawyer at $232,500.00 which represented an agreed price with a third party buyer (Ogden) less a 6% agents commission ($15,000.00) and at least an adjustment for repairs to the roof ($2,500.00) the Respondent received a special benefit on the purchase price. This was not the only benefit he received. He also received another credit of $5,000.00 for damage done by a tenant. His attorney client relationship enabled him to reassure Complainant that some or all of this sum would be recouped by a law suit against the tenant. The court concludes that a third party buyer in arms length negotiations would not have received such a benefit.

Respondent's Exhibit TT dated January 18, 1985, which represents an accounting prepared by Respondent of funds advanced by Respondent to Complainant is an indication to the court that the Respondent was intending to use the sale of Complainants property, the closing adjustment, as a vehicle to obtain reimbursement of all funds advanced to her over a period of time. Viewed independently it is not inculpatory considered

within the totality of evidence it is damaging: Respondent made no disclosure to Complainant when he agreed to buy her property that she would be immediately responsible for some or all of these expenses. Included in the accounting were expenses related to cases not yet completed, one of which Huybrechts v. Travelers (Appellate Court) was on appeal.

Respondents Statement of Account dated March 2, 1985, Exhibits 23 and 31, an invoice for payment of services rendered in 1982, 1983, 1984 and 1985 was addressed to Complainant in New York City but delivered to Attorney Gradowski shortly before the proposed March 4, 1985 closing. No invoice for the services had been billed to Complainant prior to March 2, 1985 and Complainant had no opportunity to discuss their propriety.

Complainant testified that she asked Respondent about the cost of defending her husband's appeal when she transferred 30 acres of land to him on February 24, 1982 and he replied "I'll never charge you more than the land is worth." Complainant interpreted this remark to mean the consideration of the land entitled her to some future consideration on fees for services to be performed. The court finds the comment to be ambiguous. Nevertheless, when considered in conjunction with the delayed billing it put the Respondent on notice that disclosure and communication was required on his part before there could be a meeting of the minds between the two on the billing for services rendered.

The evidence before the court is of sufficient weight to satisfy the requirement that clear and convincing proof be provided before a lawyer can be found in violation of any of the Disciplinary Rules of the Code of Professional Responsibility. The proof is clear and convincing that Respondent overreached in the contract negotiations to advance his own interest that he did not inform the Complainant of his outstanding legal fees or the full amount of monies owed to him until after the original closing date at a time when she was in severely distressed financial straits and that he discouraged a potential buyer from continuing negotiation for the purchase of her house and land and that

Respondent did not obtain intelligent informed consent from Complainant prior to entering into this business relation with her. This constituted a violation of DR 5-104 Limiting Business Relations with a client.

The court further finds that the Respondent determined all of the details of his purchase of Complainants home and arranged for her without the knowledge of Attorney Gradowski to be represented by Attorney Gradowski to avoid the appearance of a conflict of interest.

The conduct of Respondent constitutes a violation of DR 1-102(a)(6) in that it adversely reflects on his fitness to practice law and a violation of DR 7-101(A) in that he intentionally prejudiced or damaged his client during the course of the professional relationship.

Accordingly, the court reprimands Attorney Zbigniew S. Rozbicki and suspends him from the practice of law for a period of three months.

/s/ DONALD T. DORSEY
JUDGE, SUPERIOR COURT

STATEWIDE GRIEVANCE COMMITTEE : SUPERIOR COURT

vs. : J.D. OF LITCHFIELD
AT LITCHFIELD

ZBIGNIEW S. ROZBICKI : APRIL 28, 1988

PRESENTMENT OF ATTORNEY FOR MISCONDUCT

To the Superior Court within and for the Judicial District of Litchfield, now in session, comes now the Statewide Grievance Committee, duly appointed and qualified and acting through its members, and makes presentment to said Court that Zbigniew S. Rozbicki of Torrington, State of Connecticut, has been guilty of misconduct not occurring in the actual presence of the court, involving his character, integrity and professional standing and conduct and complains and says:

Count I

1. Zbigniew S. Rozbicki (hereinafter, Respondent) was duly admitted as a member of the Bar of the State of Connecticut on February 14, 1967.

2. In 1978 the Respondent, having previously become socially acquainted with Helen Huybrechts (hereinafter "Complainant"), undertook to represent her in her pending action for dissolution of marriage.

3. In July, 1980, the marriage of the Complainant and her husband was dissolved and the Complainant, according to the Respondent's calculations, owed the Respondent approximately $25,000 in legal fees.

4. In satisfaction of the legal fee, the Complainant conveyed to the Respondent a parcel of real property in Falls Village, Connecticut, approximately 30 acres in size and valued according to figures provided by the Respondent in the range of $10,000 to $15,000.

5. It was the Respondent's position at the time of the transfer of the property that the transfer would fully satisfy the Com-

plainant's obligations to him, although in his estimation it was worth less than the amount of the Complainant's outstanding bill for services.

6. The transfer of the property was effectuated by a quit-claim deed drafted by the Respondent's office and executed on October 21, 1980.

7. The Complainant was not represented by independent counsel at the time she conveyed the property to the Respondent.

8. A final decision on the Complainant's dissolution was entered by the court in November, 1981 from which the Complainant's former husband took an appeal.

9. The Respondent agreed to continue to represent the Complainant.

10. Subsequent to the successful defense of the appeal the Complainant, in satisfaction of the Respondent's fee for services, conveyed a second parcel of real property to the Respondent on February 24, 1982.

11. As with the first conveyance, the transfer was effectuated by a quit-claim deed.

12. Again, the deed was prepared by the Respondent's office and signed by the Complainant who was not represented by independent counsel.

13. At a meeting conducted on November 19, 1987, the Statewide Grievance Committee determined that the Respondent violated DR 1-102(A)(5) and (6) and DR 5-104 of the Code of Professional Responsibility in receiving real property in satisfaction of a legal fee from a client not represented by independent counsel and directed that a presentment be filed against the Respondent in Superior Court for the imposition of a reprimand, suspension for a period of time, disbarment or such other discipline as the court deems appropriate.

Count II

1. Paragraphs 1-13 of Count I are incorporated herein as paragraphs 1-13 of Count II.

14. The property that the Complainant quit-claimed to the Respondent in October, 1980 was a portion of a larger parcel that the Complainant owned and was subject to a mortgage.

15. In January, 1981 and for some time prior to that date, the Complainant's property and the parcel previously conveyed to the Respondent was the subject of a foreclosure proceeding by the mortgage bank for failure to make mortgage payments.

16. As of January 28, 1981, Complainant's mortgage, including late charges and attorney's fees, was $11,000 in arrears.

17. The late fees totalled $364.42.

18. In January, the Respondent was negotiating with the mortgage bank to reinstate the Complainant's mortgage and had obtained an agreement from the bank to withdraw the foreclosure action upon the payment of approximately $11,000.

19. On or about March 11, 1981, the Complainant sent the Respondent a check for $14,000 to satisfy the outstanding balance on her mortgage and to have the foreclosure action withdrawn. Respondent paid to the mortgage bank the outstanding balance of the Complainant's account in May, 1981, at which time the late fees had increased to approximately $900.

20. Respondent acknowledges that his delay from March, 1981 to May, 1981, to use the Complainant's March check for $14,000 to bring current her outstanding mortgage balance, was occasioned in part by his personal negotiations with the bank to have Complainant's mortgage reinstated, exclusive of the property Complainant had conveyed to the Respondent.

21. Accordingly, the Complainant was ultimately liable for additional late fees due to the Respondent's efforts to obtain a release of the mortgage on a portion of the property for his personal benefit.

22. At a meeting conducted on November 19, 1987, the Statewide Grievance Committee determined that the Respondent violated DR 1-102(A)(4), (5) and (6), and DR 7-101(A)(3) of the Code of Professional Responsibility in failing to expeditiously attempt to reinstate the Complainant's mortgage in order to negotiate a release of that portion of the property the Complainant had conveyed to the Respondent and directed that a presentment be filed against the Respondent in Superior Court for the imposition of a reprimand, suspension for a period of time, disbarment or such other discipline as the court deems appropriate.

Count III

1. Paragraphs 1-22 of Count II are incorporated herein as paragraphs 1-22 of Count III.

23. In 1984, at which time the Respondent continued to represent the Complainant in other legal matters, the Complainant chose because of financial difficulties to place on the market for sale her remaining property in Falls Village, Connecticut, including her house.

24. Thereafter, commencing in October, 1984, an individual made a series of offers to the Complainant.

25. The first, for $150,000, was considered unrealistically low and rejected.

26. A later offer of $250,000 included a condition that Complainant take back a second mortgage from the offeror.

27. This offer, too, was rejected on advice of the Respondent due to the request for the second mortgage.

28. Another offer was received from the same individual in January, 1985 for the price of $250,000.

29. This offer was conditioned essentially only on approval of a first mortgage from a lending institution providing ninety per cent financing.

30. The offeror submitted an application for a mortgage on January 13 or 14, 1985 and was verbally informed by the bank

on Friday, January 18, 1985 that the mortgage would be approved if a cosigner acceptable to the bank could be obtained.

31. Respondent testified that in response to the Complainant's request that he purchase the property, he agreed on Friday, January 18 to do so and on Monday, January 21, 1985, so advised the offeror's attorney who thereafter withdrew his client's offer.

32. Respondent also informed the bank with which the original offeror had submitted his mortgage application that he would be purchasing the Complainant's house and property.

33. Also on Friday, January 18, 1985, the Respondent asked another attorney, Richard C. Gradowski of New Milford, Connecticut, whether he would be interested in representing the Complainant with respect to the sale of the property.

34. Attorney Gradowski agreed to represent the Complainant and in the evening of Tuesday, January 22, 1985, met with the Complainant and the Respondent to have the parties sign a purchase and sale agreement.

35. Attorney Gradowski's representation of the Complainant was arranged by the Respondent in an attempt to prevent an appearance of a conflict of interest in his purchase of the Complainant's property.

36. Attorney Gradowski's fee for representing the Complainant was never discussed with the Complainant but only with the Respondent.

37. Attorney Gradowski never met with the Complainant prior to the execution of the purchase and sale agreement on January 22, 1985.

38. Attorney Gradowski's only contact with the Complainant prior to the January 22, 1985 meeting was by way of a telephone conversation to confirm that he would be "representing" her.

39. Other than the description of the property, the details of the contract signed by the Complainant and the Respondent,

including a $7,500 credit to the Respondent for repairs to the property, were supplied to Attorney Gradowski by the Respondent.

40. At the meeting, although the contract called for payment of a $10,000 deposit by the Respondent to the Complainant, the Complainant accepted a deposit of $5,000 with the explanation that the balance was for expenses the Respondent had previously expended on behalf of the Complainant.

41. Attorney Gradowski did not amend the contract to reflect that only a $5,000 deposit was being paid.

42. The Respondent ultimately purchased the Complainant's house.

43. At a meeting conducted on November 19, 1987, the Statewide Grievance Committee determined that the Respondent violated DR 1-102(A)(4), (5) and (6), DR 5-104 and DR 7-101(A)(3) of the Code of Professional Responsibility in determining all of the details of his purchase of the Complainant's home and arranging for her to be represented by counsel to avoid the appearance of a conflict of interest and directed that a presentment be filed against the Respondent in Superior Court for the imposition of a reprimand, suspension for a period of time, disbarment or such other discipline as the court deems appropriate.

WHEREFORE, Petitioner Statewide Grievance Committee prays that an order of notice of hearing be issued to the said Zbigniew S. Rozbicki notifying him to appear before the Court within sixty days for a hearing on this complaint, that costs and expenses be taxed against the Respondent, and that such proceedings may be had on this complaint as is provided by law and the rules of the Court.

Dated at Hartford, Connecticut this 28th day of April, 1988.

STATEWIDE GRIEVANCE COMMITTEE

/s/ By: DANIEL B. HORWITCH
Statewide Bar Counsel
P.O. Box 6225, Station A
Hartford, CT 06106

DR 1-102 Misconduct.

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

(2) Circumvent a Disciplinary Rule through actions of another.

(3) Engage in illegal conduct involving moral turpitude.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) engage in any other conduct that adversely reflects on his fitness to practice law.

DR 5-104 Limiting Business Relations with a Client.

(A) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

DR 7-101 Representing a Client Zealously.

(A) A lawyer shall not intentionally:

(1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101 (B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reason-

able requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

(2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-110, DR 5-102, and DR 5-105.

(3) Prejudice or damage his client during the course of the professional relationship, except as required under DR 7-102 (B).

STATEMENT OF ISSUES

I. The Court Erred By Not Granting Respondent's Motion To Dismiss For Failure To Comply With Practice Book Rule §31(a).

II. The Court Erred In Making Findings Of Unethical Misconduct On Issues Not In The Presentment In Violation Of The Respondent's Due Process Right Guaranteed By The Fourteenth Amendment.

III. The Court Erred In Finding Appellant Violated DR 5-104(A) In Failing To Disclose To Complainant Her Costs For Her Husband's Appeal And Failing To Make an Unequivocal Effort To Assure She Obtained Independent Counsel Before She Quitclaimed Land To Him As A Fee.

IV. The Court Erred In Finding Respondent Violated DR 5-104(A) When he Did Not Inform Complainant Of Owed Legal Fees Until After The Scheduled Closing Date On The Property He Was Purchasing.

V. The Court Was In Error In Finding Respondent Violated DR 5-104(A) By Discouraging A Potential Buyer From Continuing To Negotiate With Complainant To Purchase Her Property.

VI. The Court Was In Error In finding Respondent Violated DR 5-104(A) by Failing To Obtain Complainant's Intelligent Informed Consent To His Purchase Of Her Property.

VII. The Court Erred In Finding Respondent Violated DR 1-102(A)(6) and DR 7-101(A) As These Rules Are Constitutionally Vague And Violative Of The Fourteenth Amendment.

VIII. The Court Erred In Finding Respondent Violated DR 1-102(A)(6) and DR 7-101(A)(3) By Determining The Details Of His Purchase of Complainant's Property And Arranging Without Outside Counsel's Knowledge For Him To Represent Her To Avoid The Appearance Of Conflict Of Interest.

Excerpt from Trial Transcript 2/20/90, V I

(pp. 1-4)

THE COURT: Good afternoon.

MR. WEINSTEIN: Good afternoon, Your Honor.

MR. MCQUILLAN: Good afternoon.

THE COURT: Well gentlemen, we have this hearing scheduled for today and are there any things you want to take up before we proceed?

MR. MCQUILLAN: Your Honor, I would – I think I suggested before that I would like to have some delineation of what it is that we are trying to prove here. There has been a lot of material offered, written in hearings, newspaper articles; but I'd like to get down and say this is what we say done wrong.

I find, as you know, problems with the complaint, of the presentment itself. To my belief there are three, specific that are being alleged: one is that Mr. Rozbicki got a legal fee for his services and that in so doing, there was not independent counsel.

I have been at – not even to find any law that says a lawyer can't receive property in terms – for a fee and I know of no law that says, in so doing, there has to be an independent counsel. It has to be fair. You can't take advantage of that person and if there's any – I – I don't believe, Your Honor, that there is any claim here made anywhere that it was an unreasonable fee, excessive fee, in any way unfair; only that it was a fee received by way of property without independent counsel and I respectfully submit, Your Honor, that I have not heard from counsel representing the bar committee that there is such law and I would say that, in the second item – in the second item they're referring to, in count two, his failing to expeditiously attempt to reinstate the Complainant's mortgage in order to negotiate release of that a portion of property, in the probable cause summary, it was never any indication that this was a complaint against Mr. Rozbicki and it was not something that he was given the opportunity to address to.

And then, thirdly, Your Honor, somehow – I just would mention though, the first count. We get from the fact that he received his fee to the fact that it was doing business with the client. I don't know how we went from his receiving the fee to doing business with a client.

And then, as you know, in the third item, the claim is that in the business transaction he – he arranged for the terms of the contract – he dictated those and that he got another lawyer to act on behalf of his client so there would not be an appearance of conflict of interest. Never having done a closing, Your Honor, I cannot attest to any expertise in the field. But I do believe – that that's one of the things we do do, we feel there might be a conflict, we go to another lawyer and I'm sure you've experienced as a lawyer, many times people will come to our offices with – elderly people – and say we want you to this and want you to do that. My understanding has always been is that once it's referred to the other lawyer, that other lawyer is the one's that's responsible, regardless of what the referring lawyer may wish to be done. That becomes his responsibility and there's no doubt in this case that the other lawyer did undertake to do it. There's no complaint that what he did was wrong, that he was in a conspiracy with Mr. Rozbicki.

These are three, separate items, Your Honor, and I'd like to find out where we're going with them because, having read the transcripts in this case, it got pretty far afield until the bar chairman of the committee started pulling in the reins. And I think that I would like to have us have some understanding of what direction we're going in here today. And of course I'm curious as to your ruling on my motion to dismiss because I feel very strongly if that's the rule of this Court – now the Supreme Court decision is much different – that – in the Rozbicki case, that dealt with the rules of the grievance committee, said that those rules could not take jurisdiction away from the Court to hear these matters. I don't think the same applies to your own rulings and I don't think it is of much advantage to Mr. Rozbicki that these ruled upon after trial on the merits.

THE COURT: Well, I can give you a ruling on that immediately. I'm ruling against you on that. I'm denying the motion to dismiss. And on the – on the two motions to strike, I'm denying those motions to strike too. So we can – as far as I know, we're proceeding on the complaint.

MR. WEINSTEIN: Thank you, Your Honor.

THE COURT: Okay. And you may proceed.

MR. WEINSTEIN: Thank you. If I may, just as – submit, just to tying ends up, though I'm not sure it really is applicable – a reply the special defenses that have been filed here. I've drafted a trial memorandum of law on these proceedings.

May I call Mr. Horwitch?

THE COURT: Yes, please.

* * * * *

Excerpt from Trial Transcript 3/13/90, V III

(p. 129)

***rights right from the beginning. However, what I'm hearing from you, I believe, is that rather than get into all these peripheral things, are we going to stay right to this presentment and, for want of a better term, put them to the stick to show what it is that Mr. Rozbicki's conduct constituted a violation of –

THE COURT: Well that's – that's the normal rule. However, I'm well aware of what Mr. Weinstein has argued in his briefs, that when you are presented before a judge in a situation similar to this, that the judge's role is maybe somewhat expanded. But – and he may take into consideration all of the evidence.

But what I'm trying to say is, in accordance with the general understanding of the bar and the bench, that some of these issues which the Court might take congnizance of because of the volume of evidence that we have, have been litigated in another form, but these – these particular issues have not and for that

reason, my inclination, subject to what you have to say, Mr. Weinstein, is to stick to the four corners of this presenting document and the three counts and to analyze them and analyze the evidence that – that has been brought before me with reference to those three counts only.

* * * * *

(pp. 133-36)

***and show me where you've presented evidence that said there was a violation of this rule and then you want me to say, this is where there was no evidence of a clear and convincing nature to support that allegation and to try to confine it to those three subjects as best we can help, even thought we have an awful lot of stuff here, Your Honor, we get right down to it, the nature of the complaint itself is very limited to the three, specific instances.

THE COURT: Yeah, the complaint is – the complaint is based upon alleged violations of certain disciplinary rules and the complaint or the presentment is an allegation and there is, from looking at some of Mr. MacGregor's work in this case, a claim that even if those allegations are proven, they are not a violation of – of the rules. That's – that's another issue.

But again, I'd like to hear what Mr. Weinstein has to say about what we've been talking about, specifically whether in treating this matter, you expect me to make rulings only within the confines of these three counts?

MR. WEINSTEIN: I believe that is the case, Your Honor, given what the committee has done in the past with respect to this case, the way it developed, what it found or believed it had found, that it decided that it could not handle this matter within itself and it should therefore be presented to the Court.

And I would myself, I believe, so present a proposed findings of fact, conclusions of law –

THE COURT: Based upon these three counts?

MR. WEINSTEIN: – based upon these three things. However, as I've indicated throughout these proceedings at various stages, I think the Court itself may – may, in its judicial discretion, as long as it takes notice of its own discretion, it may go beyond the confines of – of the complaint if the evidence so warrants that's been presented. And that, of course, would take into account I would say, certain of the procedural safeguards in this proceeding that has been afforded Mr. Rozbicki.

What I think I'm trying to express is that when he comes here in a presentment such as this, given the record previously, and what has come out here, as long as he has been apprised and able to defend himself and to present evidence on his own behalf on matters affecting him that may arise out of these proceedings, then his – then his procedural safeguards have been protected and therefore, that would open up the door for the Court, within – it's not a wide open door, I don't think, there are limits, but that I think is up to the Court.

THE COURT: Well, but that would – then it would be incumbent upon you to direct the Court's attention –

MR. WEINSTEIN: That's correct, Your Honor.

THE COURT: – to what you think there has been proof or to proof that you think is sufficient to warrant judicial intervention outside the presentment.

MR. WEINSTEIN: I would – yes, Your Honor, I think it would be – I would – if that were – indeed, if I felt that that were indeed the case, that I would then so present –

THE COURT: That's what you would do and of course, Mr. McQuillan would have the benefit of – of your thinking when you prepare this memorandum. But as I say, it's – I'm – I'm clearly hesitating about that because there has been two findings of probable cause; one by a local committee and one by a Statewide Grievance Committee and the net result differs only in the second count.

MR. WEINSTEIN: That's correct, Your Honor.

THE COURT: It doesn't mention any injudicious or inappropriate conduct on – on the part of Mr. Rozbicki that is not contained in this presentment. I mean, I've read the original complaint of – of Mrs. Huybrechts but I haven't heard anything about it and there's nothing in this – and there's nothing in this presentment so, as far as I'm concerned, I'm excluding it. I'm not – I'm not taking any cognizance of that.

MR. MCQUILLAN: Well, they have spelled out in several paragraphs what it is that Mr. Rozbicki did that created a violation and I think what you're saying is that that's what you're going to stick to to see whether it –

THE COURT: That's what – I – I'm going to wait until I see what – what Mr. Weinstein has to say – say in accordance with my – just my previous remarks, but I just indicated to you what I'm inclined to do because I – I don't want you to be wasting a lot of time on – on your – on your briefs and your findings of fact. I mean, –

MR. MCQUILLAN: Are you going to rule on my motion to dismiss?

THE COURT: Yes. Yes, I'm going to deny your motion to dismiss.

MR. MCQUILLAN: I didn't mean to be***

* * * * *

(pp. 151-53)

MR. MACGREGOR: But – I – I realize that, Your Honor, I'm saying as far as the value of the property, they went into the value of the property, the fact Mr. Ogden made offers. What has that got to do with that?

THE COURT: The – the value of the property, I've heard a lot of evidence on that, including Mr. Oles' testimony today and I think that the – the issue in count number three is not a great deal different than the issue in count number one. The only difference is the presence of Mr. Gradowski and the language to

avoid the appearance of conflict of interest. There's been – I – I would have to consider whether there was any evidence of a prior arrangement between Mr. Gradowski and Mr. Rozbicki to the detriment of the client.

MR. MACGREGOR: We're not arguing about that, there's testimony on that – that too, but I think it –

THE COURT: There is testimony on that. There's evidence on that I will consider it. If there's no evidence on it, I consider the – the issue to be substantially the same as count number one. How do you feel about that, Mr. Weinstein?

MR. WEINSTEIN: Well I feel it goes to – the allegations go to the question of her real and – the client's real independence from Mr. Rozbicki on this matter in this sale of the house. We've had a lot of testimony as to the nature of the – leading up to the agreement to sell to him, whether she was really independently advised.

THE COURT: Well how does that differ form count number one, except for the presence of Mr. –

MR. WEINSTEIN: Except that there's – there's another person involved in it at – at that time.

THE COURT: – that's the only one. And whether – and whether Mr. Gradowski rendered her appropriate services is –

MR. WEINSTEIN: Well, that's a different issue.

THE COURT: That's a totally different issue.

MR. WEINSTEIN: Yes, I don't think we're here on Mr. Gradowski's conduct and I never – I don't think it's ever been brought into issue.

MR. MCQUILLAN: It wasn't but how can it be separated? He was acting improperly at the instructions of – of course, that's what we can argue in our brief. But I think that what I'm concerned about, I have really had a problem understanding why do I get another lawyer involved in the case? So as to avoid the

appearance of a conflict, no question. As long as that lawyer is acting as he's charged –

THE COURT: Subliminally the – the argument is he was the alter ego of Mr. Rozbicki, that's what the subliminal argument is.

MR. MCQUILLAN: That's – she said he was a figurehead.

THE COURT: That's what she said.

MR. MCQUILLAN: And if he was, then he certainly –

THE COURT: If he was, then Mr. Rozbicki is in a lot of trouble. And if he wasn't, he isn't in any trouble on – on that particular allegation.

MR. MCQUILLAN: Okay, you saw Mr. Gradowski and you've heard him.

THE COURT: Well, we're narrowing the issues, trying to narrow the issues down. I think you can put together a – a brief on this situation.

You should mention very briefly, because I – that, you know, what the testimony was on the value of the – of the land. I have had no testimony whatsoever on the value of the services. There's no point in –

* * * * *

Excerpt from oral argument before Connecticut Supreme Court on 3/21/91

(pp. 7-10)

***the trial Court had before it a rather substantial record; it had several witnesses; it had testimony both the principal persons.

JUSTICE SHEA: Well what are you saying he did wrong? There's a lot of things in here in a long memorandum. What do you claim he did wrong?

MR. WEINSTEIN: I claim he did wrong in that he certainly overreached in his fiduciary relationship with a client in –

JUSTICE SHEA: Well specifically what did he do? Mr. Horton said the transaction on the sale of this land took place – the contract was drawn up by an independent counsel. The trial judge specifically says that this lawyer who apparently Rozbicki had obtained for the complainant did not act as a pawn and exercised reasonable judgment and he had no criticism of him at all. So doesn't that take away a lot of your claims here about overreaching inasmuch as the contract itself was, at the time it was drawn up, she had independent counsel?

MR. WEINSTEIN: Well, Your Honor, the transcript indicated, the transcript of testimony in which Mr. Gradowski testified; he took down the details of that transaction directly from Mr. Rozbicki's office. The only thing he added to the contract, and the only thing he did with the contract, was to do a title search so they would have the proper title description to be appended to the contract. All other terms were set out by Mr. Rozbicki. I'm not saying that Mr. Gradowski did not speak to Helen Hibrix (phonetic spelling). I'm not saying that he did not attempt to do something later on. The only thing he really did later on was to come back when the bills were submitted.

JUSTICE SHEA: But the contract had not been signed at that point in time?

MR. WEINSTEIN: The contracts were not signed when Mr. Gradowski received all the details of the contract.

JUSTICE CALLAHAN: What's wrong with that if that's what they agreed on?

MR. WEINSTEIN: Nothing wrong -- I'm not saying anything is wrong in terms of what Mr. Gradowski did. He took it down.

JUSTICE CALLAHAN: No, Mr. Rozbicki. If he had talked to the client and this is what they agreed on and he conveyed it to Gradowski, what did he do wrong?

MR. WEINSTEIN: At that point he had not done anything wrong at that point, Your Honor. He had conveyed his understanding. And then as the transaction went through with the

signing of the contract where there is a reference in the contract – there is a requirement in the contract of a ten thousand dollar downpayment, only one half of which was submitted in which the people all agreed, okay, we'll waive the – not waive, excuse me; will not require at that point the submission of the five thousand dollars. There was no amendment made to that contract. The five thousand dollars, from the testimony in the hearing, apparently was intended by Rozbicki to be an offset for other costs for which no bills had been submitted. We've had here a client of Mr. Rozbicki, a client of longstanding. And they had a very good relationship over the term of their professional relationship. They had a professional and a social relationship in which she had great reliance upon Mr. Rozbicki. And she did take some of what he – of his advice and his structure of the transaction.

JUSTICE PETERS: You still, Mr. Weinstein, have not answered Justice Callahan's question or Justice Shea's. What did he do wrong? So far you haven't really pinpointed that for us.

MR. WEINSTEIN: What he did wrong was to be able to take advantage of his own client; a person with whom he had a long term relationship; and owed a duty as a lawyer to ensure that she receive the best price available. And he would not be in a position to be – to have a more advantageous situation with respect to the transaction of the property than a third party might. And he was the controlling force until the submission of the bill dated March 2nd. That bill was not received by Mr. Gradowski until March 4th. Once that bill was submitted the transaction fell apart until – a Court action was necessary by specific performance. And there was various actions pending at that time.

JUSTICE SHEA: Mr. Horton's argument there, of course, is that at the point where she had independent counsel the attorney/client relationship between the two of them, at least for this transaction, had certainly terminated. What do you have to say in response to that? And therefore, he couldn't have been guilty of an ethical violation.

MR. WEINSTEIN: Well, Your Honor, the attorney/client relationship continues to some extent when there was fiduciary relationship between the parties. It extends in any dealings for a certain period. Is it cut off? The cases indicate that it does not stop just because a transaction comes up and the lawyer says, okay, you're represented by this counsel; I'm represented by this – or I represent myself. We terminate the relationship. His intimate knowledge –

JUSTICE SHEA: In respect to what he did wrong – basically, what he did wrong; let's say, claiming***

* * * * *

(2)

No. 91-985

In The

Supreme Court Of The United States

October Term, 1991

ZBIGNIEW S. ROZBICKI,

Petitioner,

v.

STATEWIDE GRIEVANCE COMMITTEE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT
(Docket 14101)

RESPONDENT'S BRIEF IN OPPOSITION

SEYMOUR N. WEINSTEIN
671 Bedford Street
Stamford, CT 06901
(203) 324-2126

Counsel of Record for Respondent

January 10, 1992

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REASONS FOR DENYING THE PETITION

This matter involves the peculiar and unique relationship between a Connecticut practicing attorney and the Superior Court of the State of Connecticut, the state trial court, the entity responsible for oversight of attorney conduct. Petitioner charges that the grievance proceeding lacked to due process and claims that two disciplinary rules are void because of vagueness.

1. Petitioner's reasons for granting the petition are not within the guides in Rule 10 of the Rules of the

Supreme Court of the United States. The Connecticut court has not decided an important question of federal law or decided a federal question that conflicts with applicable decisions of this Court.

2. Petitioner claims that he was found to be in violation of the disciplinary rules upon charges not brought by respondent in presenting petitioner to the trial court. The trial court specified all the facts found based upon the evidence presented to it by petitioner and respondent over the course of seven days and no surprises or new matter were presented (Memorandum of Decision, petitioner's appendix, pp. 27-32).

This court has chosen not to interfere with state regulation of attorneys except in extraordinary circumstances. In *Zauderer v. Office of Disciplinary Counsel*, 471 US 626, 105 S Ct 2265, 85 L Ed2d 652 (1985) the first amendment of the United States Constitution was implicated but due process was not violated by the state grievance procedures.

In *In re Ruffalo*, 390 US 544, 88 S Ct 1222, 20 L Ed2d 117 (1968), the appellant challenged disbarment by the federal court for a charge that arose out of evidence first elicited in testimony before the state court, the facts not having been before the grievance board nor part of the allegations presented to the court. The state court disbarred the appellant and the federal court disbarred the appellant based upon the record before the state court. This court denied certiorari to the state court proceeding. *Ruffalo v. Mahoning County Bar Assn.*, 379 US 931, 85 S Ct 328, 13 L Ed2d 342 (1964).

This court also denied certiorari to *Kansas v. Phelps*, 226 Kan 371, 592 P2d 180 (1979), at *Phelps v. Kansas*,

444 US 1045, 100 S Ct 732, 62 L Ed2d 731 (1979). The state court found that the record presented from the state board of law examiners supported a violation in addition to the ones recommended. In *Matter of Phelps*, 637 F2d 171 (10 Cir., 1981), the lawyer was not sanctioned by the federal court from practice at the federal bar, the state court sanction remaining, nonetheless.

3. Connecticut's Code of Professional Responsibility with respect to DR 1-102(A)(6) and DR 7-101(A)(3) is not unconstitutionally vague under the Fourteenth Amendment of the United States Constitution. DR 1-106(A)(6) proscribes a lawyer's conduct that reflects adversely on his fitness to practice law. DR 7-101(A)(3) proscribes any action by a lawyer that will prejudice or damage his client.

As in *Parker v. Levy*, 417 US 760, 94 S Ct 2547 (1974), petitioner as a lawyer is a member of a prescribed class who had fair notice that his conduct was prohibited and he could not attack the rule simply "because the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit." at p. 756. *Parker* involved the proscription of conduct unbecoming to an officer and gentleman and which prejudiced the good order and discipline of the armed forces. Absent interference with a fundamental right such as free speech, petitioner as a knowledgeable member of a class (lawyer) must demonstrate clearly that the challenged rules are vague in all applications to be deemed constitutionally infirm. *Hoffman Estates v. Flipside*, 455 US 495, 497-499, 102 S Ct 1186 (1982).

4. The Connecticut Supreme Court did not hold that reference to specific sections of the Code of Professional

Responsibility is not required in a presentment for attorney misconduct. Its reasoning in affirmance of the decision of the Superior Court, the court which heard all the evidence in a trial *de nova*, is embodied within all the pages of its opinion. Petitioner's appendix, pp. 1-16. Petitioner attempts to bootstrap a due process violation through a footnote and avoid the body of the opinion. The footnote is not the decision of the court.

CONCLUSION

The suspension of petitioner from the practice of law for ninety days was sustainable under the evidence and the application of the law governing attorney misconduct. No violations of due process occurred and the rules of attorney misconduct as applied were not constitutionally vague.

This court should not grant a petition involving the inherent authority of a state court to regulate its members' conduct except in extraordinary circumstances.

For the reasons presented, the petition for a writ of certiorari should be denied.

Respectfully submitted,

SEYMOUR N. WEINSTEIN
671 Bedford Street
Stamford, CT 06901
(203) 324-2126

Counsel for Respondent